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No. 00-

IN THE

Supreme Court of the United States

JOHN F. DOHERTY, *et al.*,

Petitioners,

v.

AMERICAN HOME PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit's ruling against Petitioners **directly conflicts** with the Eighth Circuit's contrary ruling in *Langer v. Iowa Beef Packers, Inc.*, 420 F.2d 365 (8th Cir. 1970). Under the Eighth Circuit's ruling in *Langer*, Respondent must be held liable for breach of the Stock Option Agreement, as a matter of law.

The Second Circuit's ruling is also in **apparent conflict** with rulings in favor of Petitioners, by the Third, Fifth, Sixth and Ninth Circuits, in the field of enforcement of stock options and/or deferred employee-benefit compensation agreements. The questions presented here are:

I. Whether a company should be permitted, as a matter of law, to eviscerate employees' **previously vested** stock option rights (rendering them **worthless** years before their stated expiration date) solely upon the company's sale of their employment contracts, in disregard of the fact that: (a) there was **no wrongdoing** or poor job performance by the employees and (b) **prior** to the sale, the employees had already provided **all** of the designated consideration under the Stock Option Agreement to the company?

II. Alternatively, are Petitioners entitled to discovery, as a matter of law, based upon specific and **uncontroverted** factual allegations as to Respondent's **bad-faith**, as to the intentionally evasive manner in which Respondent prepared the Stock Option Agreement (which is **silent** on the effect of a potential sale by Respondent of a subsidiary on **previously vested** stock options), and its misrepresentations to Petitioners that their **vested** stock options would remain intact despite a sale?

III. Whether the Second Circuit's designation of its "summary order" as a ruling that may **not** be cited as precedential authority to that same Court, or any other Court, in a different case, is **unconstitutional** under Article III of the U.S. Constitution, and violative of the Framers' intentions to avoid the issuance of "private opinions"?

PARTIES TO THE PROCEEDING

Petitioners are 197 individuals who acquired **vested** stock options in Respondent pursuant to a Stock Option Agreement with Respondent that was executed by each of them. A complete listing of the names of all 197 Petitioners is set forth in Appendix E.

Respondent is American Home Products Corporation.

The Solicitor General is also being served with this Petition as a "respondent" because the constitutionality of a court rule from the Second Circuit is being challenged herein.

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STATEMENT OF JURISDICTION

The unreported and unpublished "Summary Order" of the United States Court of Appeals for the Second Circuit was entered on June 15, 2000. Thereafter, the Second Circuit entered an order on August 4, 2000 denying a timely petition for a rehearing and/or a rehearing en banc (App. C). This petition for a writ of certiorari is filed within 90 days from that August 4, 2000 date denying the timely petition for rehearing. 28 U.S.C. § 2101(c).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The merits of this case involve the **conflicting application** of common-law principles to previously vested stock options, arising under the Vested Rights Doctrine and the Prevention Doctrine, by different federal circuit courts of appeal.

There is also a constitutional issue involved herein (*see* Point III, *infra*), and the following constitutional provision and court rule are at issue:

Article III of the U.S. Constitution states, in pertinent part:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Rules of the Second Circuit:

> 0.23 Dispositions in Open Court or by Summary Order
>
> The demands of an expanding case load require the court to be ever conscious of the need to use judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order. Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. **Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.**

(Emphasis added).

STATEMENT OF THE CASE

Respondent, American Home Products Corporation, prepared a standardized form of Stock Option Agreement (App. D) for the express purpose, set forth in an accompanying Stock Option Plan, of financially inducing each of the **197 Petitioners** to become and/or remain as employees of Respondent's subsidiary, Corometrics Medical Systems, Inc. ("Corometrics"). Once Petitioners had worked for at least **two years** for Corometrics — the designated consideration to be reaped by Respondent — Petitioners acquired a **vested** contractual right to exercise their stock options, and purchase stock in Respondent, at any point from the vesting date until the stated expiration date of the options.

In reliance upon the deferred financial benefits to be realized under the Agreement, all of the 197 Petitioners worked for Respondent's subsidiary for at least the two year vesting-period. Indeed, many of them worked for Respondent's subsidiary for decades. Unquestionably, the stock options would become immensely valuable to Petitioners if, and when, the market-price for reselling Respondent's stock were to exceed the exercise-price for buying the stock under the Agreement.

After Petitioners had secured a **vested** contractual right to buy Respondent's stock at the exercise-price, but **before** the market-price for the stock exceeded that exercise-price, Respondent sold its subsidiary Corometrics (and Petitioners' employment contracts with Corometrics) to a third-party. Respondent notified Petitioners that the **vested** stock options would **not** be honored following the sale, despite the fact that there were many years left before the stated expiration date of the options.

Prior to the expiration date for the options, the market-price for Respondent's stock rose well in excess of the exercise-price at which Petitioners are entitled to purchase the stock under the Agreement. Due to Respondent's refusal to honor those **vested** stock options, Petitioners sued Respondent for appropriate relief.

Apart from the Second Circuit's ruling, the overwhelming legal consensus, under federal and state appellate rulings, is that once the employees' stock option rights have **vested** — by working for the required number of years for the subsidiary as dictated by the Agreement — those **vested** stock option rights cannot be eviscerated by the company, absent wrongdoing by the employees. *See, e.g., Langer v. Iowa Beef Packers, Inc.*, 420 F.2d 365 (8th Cir. 1970).

Accordingly, a decision by the Supreme Court would resolve a dispositive legal issue of **apparent first impression**, at this level, as to whether a company should be permitted to effectuate a **forfeiture** of employee stock options **after** those stock options have already **vested**, absent any wrongdoing by the employee. A decision would resolve a **direct conflict** between the Eighth Circuit (and other circuits) and the Second Circuit on this legal issue of paramount importance for employees throughout the country.

Basis for federal jurisdiction in the first instance: After Respondent's removal of this case to federal court, the United States District Court for the District of Connecticut, pursuant to the supplemental jurisdiction provisions of 28 U.S.C. § 1441(c), exercised subject matter jurisdiction over both the federal age discrimination claim, and the Delaware state-law claims sounding in breach of contract and tort.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S RULING ERRONEOUSLY PERMITS A COMPANY TO EVISCERATE EMPLOYEES' *PREVIOUSLY VESTED* STOCK OPTION RIGHTS (RENDERING THEM WORTHLESS YEARS BEFORE THEIR STATED EXPIRATION DATE), WHENEVER A COMPANY MAY WISH TO DO SO, SOLELY UPON THE COMPANY'S SALE OF THEIR EMPLOYMENT CONTRACTS (BUT UNRELATED TO ANY WRONGDOING OR POOR JOB PERFORMANCE BY THE EMPLOYEES), AND NOTWITHSTANDING THAT *PRIOR* TO THE SALE, THE EMPLOYEES HAD ALREADY PROVIDED *ALL* OF THE DESIGNATED CONSIDERATION UNDER THE STOCK OPTION AGREEMENT TO THE COMPANY.

THE SECOND CIRCUIT'S RULING IS IN *DIRECT CONFLICT* WITH THE EIGHTH CIRCUIT'S CONTRARY RULING IN *LANGER v. IOWA BEEF PACKERS, INC.*, 420 F.2d 365 (8th Cir. 1970), AND IS ALSO IN *APPARENT CONFLICT* WITH CONTRARY RULINGS BY THE THIRD, FIFTH, SIXTH AND NINTH CIRCUITS IN THE FIELD OF ENFORCEMENT OF STOCK OPTIONS AND DEFERRED EMPLOYEE-BENEFIT COMPENSATION AGREEMENTS.

The Second Circuit acknowledged that Petitioners had secured **vested** stock option rights **before** Respondent sold their employment contracts (App. A, page 6a). Those stock options had become **vested**, prior to the sale, because each

of the 197 Petitioners had worked for Respondent's subsidiary for at least **two years** — which is the contractually designated **consideration** conferred by Petitioners upon Respondent (App. D). Indeed, many of the Petitioners had worked for Respondent's subsidiary for decades.

It is **undisputed** that: (a) Respondent drafted the Stock Option Agreement for the **express purpose**, set forth in the accompanying Stock Option Plan, of financially inducing Petitioners to become and/or remain as employees of its subsidiary Corometrics for at least a two year period of time; (b) Petitioners' stock option rights had **vested** because all of them had worked for Respondent's subsidiary for more than two years, at which point the options became exercisable until the stated expiration date of the options; (c) the Agreement does **not** provide for the immediate termination of the stock options upon a sale by Respondent of a subsidiary (unlike seven different contingencies which provide for the immediate termination of the options); and (d) Petitioners were **not** afforded any opportunity to negotiate the provisions of the Agreement. The Second Circuit's ruling disregards these salient facts.

Instead, the Second Circuit's ruling permits Respondent to use a mere sale of Petitioners' employment contracts as a vehicle to effectuate an immediate forfeiture of their **previously vested** stock option rights (rendering them **worthless** years before their stated expiration date) — even though Respondent's sale of their employment contracts **directly prevented** Petitioners from satisfying the "employment condition" in the Agreements that they be "employed" by Respondent's "subsidiary" in order to exercise their options.

Not only did the Second Circuit's ruling cite **no supporting precedent** in adopting a result which is in sharp conflict with several other federal circuits, that ruling also creates grave economic consequences for employees throughout the country.

The Second Circuit's ruling enables Respondent, **and all other companies in the future**, to obtain **all** of the designated economic benefits under Stock Option Agreements, without ever having to provide any of the promised economic benefits to the employees in return.

The Second Circuit's ruling also enables companies to destroy employees' **vested** stock option rights, with impunity, at any time the company may choose, despite the lack of any language in the Agreements specifically permitting them to do so upon a sale of the employment contracts.

The Second Circuit's ruling also **rewards** companies that summarily extinguish employees' **vested** stock option rights through a sale of their employment contracts (not through any wrongdoing or poor job performance by employees), despite the fact that the companies specifically induced the employees to render years of service for them on the expectation of receiving deferred stock option compensation once they had provided the designated consideration to the company under the Agreements. That **result** should not be permitted to stand, particularly where the subject Agreement, which was drafted **solely** by Respondent, does not **specifically** inform Petitioners that the options are "terminated" if Petitioners' employment contracts are sold.

The Second Circuit's determination effectively means that companies can divest themselves of their contractual

obligations to employees, and can unilaterally deprive employees of their **vested** stock option rights, absent any wrongdoing by employees, **whenever the company may wish to do so**, despite the ample consideration the employees have already provided in their years of service to the company.

Significantly, the Second Circuit's determination is in **direct conflict** with the contrary determination by the Eighth Circuit in *Langer v. Iowa Beef Packers, Inc.*, 420 F.2d 365 (8th Cir. 1970). In *Langer*, the Eighth Circuit specifically held that a company's sale of a subsidiary (and the employment contracts therewith) does **not** abrogate the employees' previously **vested** stock option rights.

In *Langer*, the Eighth Circuit held that, as a matter of law, the company's conduct in selling the subsidiary and **preventing** the employee from being able to satisfy the "employment condition" under the Agreement, **after** the employee's stock option rights had already **vested**, constituted a breach of contract, and rendered the company liable for damages.

In predicting how the Iowa Supreme Court would rule on this **common-law** issue of contracts, the Eighth Circuit, in *Langer*, correctly found that the Agreement could **not** be interpreted in a manner which would cause a forfeiture of the employees' **previously vested** stock option rights, and cogently reasoned, in pertinent part, as follows (*see Langer, supra*, 420 F.2d at 366-70):

> Is a stock option agreement which provides that the option shall terminate if the optionee ceases to be an employee of the optionor "for any reason,

whether voluntarily or involuntarily" terminated by the optionor's sale of a part of the assets of its business including the optionee's employment contract? . . .

We hold that the District Court correctly decided that this issue should be determined as a matter of law, but erred in its application of the law. Contract interpretation is generally a matter of law, while the intent of the parties is generally a question of fact. But where no extrinsic evidence is necessary to determine the intent of the parties, **and where the intent is implicit from the agreement and from its context**, the legal effect of the agreement is properly resolved by the courts as a matter of law . . .

The primary purpose of a company stock option plan is the attraction and retention of desirable employees, and the granting of an option is considered a form of compensation . . . **The consideration for the option is the employee's agreement to work for the company for a specified period of time [citation omitted]**. In cases with circumstances analogous to the facts here, courts have been reluctant to deny or permit the exercise of options where such would result from an unreasonable or unfair interpretation of the option contract . . .

Other courts have held that an optionee, who has given full consideration under a stock option agreement, has an absolute right or a

> **vested right to exercise the option despite the broad termination language employed by the optionor in the agreement** [citations omitted]. For a review of the related cases adhering to the **vested rights'** theory, see *Lucas v. Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967).
>
> It is our conclusion that the interpretation of the Stock Option Agreement urged by IBP [the optionor] would not be sustained by the Iowa court. **We cannot believe that the parties here intended that the optionee give full consideration under the Agreement and then be deprived of his right to exercise the option by the sale of his employment contract.**
>
> As we interpret Section 5 of the Agreement, it does not mean that termination of the option could result from the sale of the optionee's employment contract without prior notice thereof to the optionee. **It may be, however, that the parties, at the time of contracting, never put their minds to the question of sale of an employment contract. We do not believe this would alter the decision of the Iowa court because, in such an instance, it has been held that the employee should have the advantage of his boss's language** [citations omitted] . . . A question remains as to damages recoverable for breach of the Agreement. This issue was neither briefed nor argued. We, therefore, express no opinion on the issue and remand it for determination by the District Court.

(Emphasis added).

The Eighth Circuit correctly anticipated how the Iowa Supreme Court would thereafter rule on this **common-law** contract issue. In *Hilgenberg v. Iowa Beef Packers, Inc.*, 175 N.W.2d 353, 357-62 (Iowa 1970), the Iowa Supreme Court essentially adopted, wholesale, the Eighth Circuit's reasoning in *Langer*, by preventing the company from effectuating a forfeiture of the employee's **vested** stock options through a sale of the employment contract, despite the broad "termination language" in the Stock Option Agreement.

Other federal appellate courts have also held that, as a matter of law, a company cannot effectuate a forfeiture of an employee's **vested** stock options in reliance upon an "employment condition" where the company's action **prevents** the employee from remaining "employed", for reasons that are **unrelated** to any wrongdoing or poor job performance by the employee. *See, e.g., Schweiger v. Iowa Beef Processors, Inc.*, 802 F.2d 1032, 1033-36 (8th Cir. 1986), *pet. for reh'g en banc denied*, 816 F.2d 1217 (8th Cir. 1987) where the Eighth Circuit revisited and adhered to its prior ruling in *Langer*.

In *Schweiger*, the Eighth Circuit, in granting summary judgment to the employee, held that, as a matter of law, a company's **involuntary termination** of an employee, **after** the employee's stock option rights had already **vested**, does **not** deprive the employee of his **vested** stock option rights, despite an "employment condition" in the Stock Option Agreement stating that the employee must be "employed" by the company in order to exercise the options. *Id.*

In *Schweiger*, the Eighth Circuit stated that "*Langer* makes it clear that ascertaining the intent of the parties is of paramount importance in interpreting a contract, especially

where, as here, the interpretation urged by one party would result in a forfeiture of vested rights." *Id.*, 802 F.2d at 1035.

See also, e.g., Haft v. Dart Group Corporation, 877 F. Supp. 896, 903-04 (D. Del. 1995), *affirmed* slip. op. (3d Cir. 1996) ("The proposition that an employee would contract with his employer and assume the risk of losing his stock options if the employer terminated him without cause is inconceivable . . . The Court finds that the clause at issue [the employment condition] does not indicate that Plaintiff contracted to assume the risk that Defendant would hinder his right to exercise the options."); *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1199-00 (9th Cir. 1996) ("It is well-established that an optionor may not rely on an optionee's failure to exercise an option when he has committed any act or failed to perform any duty calculated to cause the optionee to delay in exercising the right . . . Similarly, it is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure."); *Ballard v. El Dorado Tire Company*, 512 F.2d 901, 907-08 (5th Cir. 1975) ("Fulfillment of a contract promise, here to issue stock, is not excused by failure of a condition (non-termination) which the promisor himself causes to happen. One who promises to do a thing if a given condition occurs has impliedly promised not to prevent the performance of the condition. Otherwise, any conditional promise would be illusory, not real."); *O'Brien v. United Home Life Assurance Co.*, 147 F. Supp. 761, 764 (E.D. Mich. 1957), *aff'd*, 250 F.2d 483 (6th Cir. 1958) ("[W]e do not mean to imply that defendant could have made it impossible for plaintiff to so remain and thereby deprive him of his right to the stock.").

This **common-law** contract issue should result in the **same** stock option interpretation in every jurisdiction, regardless of whether Iowa law, some other state's law or **Delaware law (which applies herein)** is used.

Finally, both the Eighth Circuit in *Langer* and the Iowa Supreme Court in *Hilgenberg* determined, as a matter of law, that the company was precluded from effectuating a forfeiture of the employees' **vested** stock option rights in the context of a far more expansive "termination of employment" clause. Indeed, the language of the "termination" clause in the instant Stock Option Agreement, drafted **solely** by Respondent, is **far less broad** than the "termination" clauses at issue in *Langer* and *Hilgenberg*.

Here, the Agreement merely provides that Petitioners are to be "then employed" by Respondent or its subsidiary in order to exercise the options (App. D).

Unlike *Langer* and *Hilgenberg*, the instant Agreement does not expressly provide that a termination of employment can be effected "for any reason, whether voluntarily or involuntarily".

Under Delaware law, which applies herein (App. D), these omissions must be construed strongly **against** Respondent's contract interpretation *and* strongly in **favor** of the contract interpretation proffered by, and the reasonable expectations of, Petitioners. *See Kaiser Alum. Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) (Delaware Supreme Court stated that "Where, as here, the ultimate purchaser of the securities is not a party to the drafting of the instrument which determines her rights, the reasonable expectations of the purchaser must be given effect.");

Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742, 745 (Del. 1997) (Delaware Supreme Court stated that "It is the obligation of the insurer to state clearly, just as it is the obligation of the issuer of securities, to make the terms of the operative document understandable to a reasonable investor whose rights are affected by the document . . . Therefore, it is incumbent upon the dominant party to make the terms clear. Convoluted or confusing terms are the problem of the insurer or issuer — not the insured or investor."); *Conner v. Phoenix Steel Corp.*, 249 A.2d 867, 868-69 (Del. 1969) (Delaware Supreme Court stated, in the analogous context of pension plans, that "[P]ension plans are to be construed liberally in favor of the employee and, if possible, should not be so construed as to permit the employer unilaterally to make illusory his promise to pay benefits . . .").[1]

Neither Respondent nor the Second Circuit cited any Delaware case, or any case from any other jurisdiction, which ever questioned — much less jettisoned — the application of law and public policy by the Eighth Circuit in *Langer*, or by the Third, Fifth, Sixth and Ninth Circuits in the cases cited above, or the Delaware Supreme Court interpretations of employee contracts in the cases cited above.

Apart from the Second Circuit's ruling, our research has failed to disclose any other federal or state appellate court

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1. *See also Mastrubuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 (1995) (this Court stated that there is "substantial reason for preferring the meaning" proffered by the non-drafter because the drafter "is also more likely than the other party to have reason to know of uncertainties of meaning [and] he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.").

decision which divested an employee of its **vested** rights to deferred stock option compensation because of action taken by the company (such as the company's sale of an employment contract), **after** the stock options had already **vested**, that is **unrelated** to any wrongdoing or poor job performance by the employee.

In sum, there is a **sharp conflict among the federal circuits** which, if not resolved by the Supreme Court, will make the enforceability of employees' **vested** stock option rights depend upon the venue of the lawsuit, despite the absence of any wrongdoing by the employees. Hence, it is respectfully requested that this petition for certiorari be granted to resolve this conflict.

II.

ON PETITIONERS' ALTERNATIVE APPLICATION FOR DISCOVERY, THE SECOND CIRCUIT OVERLOOKED A CONTROLLING DECISION FROM THE DELAWARE SUPREME COURT WHICH *REQUIRES* DENIAL OF RESPONDENT'S PRE-ANSWER MOTION, UNDER FED. R. CIV. P. 12(b)(6), TO DISMISS PETITIONERS' CLAIMS OF BAD-FAITH, BECAUSE THERE HAS BEEN NO DISCOVERY.

Petitioners alternatively sought discovery on their claims of bad-faith against Respondent if the Second Circuit disagreed with their contract interpretation as to the scope of their **vested** stock option rights. **Indeed, no discovery has ever been conducted nor did the Second Circuit permit Petitioners to pursue the same.**

Discovery would be relevant to Petitioners' claims for relief based upon particularized factual allegations as to Respondent's **bad-faith**, which are **uncontroverted** in the Record, in connection with the intentionally evasive manner in which Respondent prepared the Stock Option Agreement (which is **silent** on the effect of a potential sale by Respondent of a subsidiary on **previously vested** stock option rights), and Respondent's misrepresentations to Petitioners that their options would remain intact notwithstanding a sale, to wit:

(a) Respondent falsely represented and advised Petitioners that their options could only be prematurely terminated, prior to their stated expiration date, in accordance with the seven limited circumstances set forth in Section 5(g) of the Plans — none of which involved Respondent's sale of their employment contracts; and

(b) Respondent intentionally crafted the Agreement by using the imprecise term "then employed", instead of an unequivocal term of "sale of a subsidiary" or "sale of an employment contract", because Respondent feared that Petitioners would **never** have been induced to become and/or remain as employees of Respondent's subsidiary had they been clearly apprised in writing that their **vested** stock options could be rendered **worthless**, whenever Respondent might elect to sell their employment contracts (but not because Petitioners had engaged in any wrongdoing or poor job performance).

Pursuant to the Agreement, Delaware law governs this issue (App. D). In *Desert Equities, Inc. v. Morgan Stanley*

Leveraged Equity Fund, II, L.P., 624 A.2d 1199, 1208-09 (Del. 1993), the Delaware Supreme Court held that even a generally pleaded claim of bad-faith **cannot** be dismissed on the pleadings, without first affording the plaintiff a proper opportunity to uncover substantiating evidence through discovery. Delaware law, therefore, **mandates** that Petitioners' **uncontroverted** allegations of Respondent's bad-faith — in its long-standing scheme to receive Petitioners' multi-year services as employees for its subsidiary without properly compensating them in return — **cannot** be resolved at the pleadings stage, without affording Petitioners a proper opportunity to establish their bad-faith claims through discovery.

Accordingly, before Respondent is permitted to reap **all** of the consideration provided to it by Petitioners under the Agreement but without providing any consideration in return, and in view of the controlling discovery decision from the Delaware Supreme Court which was overlooked by the Second Circuit, it is respectfully requested that this petition for certiorari be granted.

III.

THE SECOND CIRCUIT'S DESIGNATION OF ITS RULING AS A "SUMMARY ORDER" THAT MAY *NOT* BE CITED AS PRECEDENTIAL AUTHORITY TO THAT COURT, OR ANY OTHER COURT, IN ANY DIFFERENT CASE, IS UNCONSTITUTIONAL AND VIOLATES ARTICLE III OF THE U.S. CONSTITUTION.

As set forth above, the Second Circuit's ruling **directly conflicts** with the previously reported decision of the Eighth Circuit in *Langer*, *supra* (and with other reported rulings of the Third, Fifth, Sixth and Ninth Circuits).

Despite this sharp conflict among the federal circuits, the Second Circuit designated its ruling, which rejects all of that reported precedent, as a "summary order" that may not be cited as "precedential authority" in other stock option cases (App. A):

> THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Significantly, in *Anastasoff v. United States*, 2000 WL 1182813 (8th Cir., Aug. 22, 2000), the Eighth Circuit recently held that its own version of a similar local court rule was **unconstitutional** and violates Article III of the U.S. Constitution.

Hence, certiorari is sought not only on the merits of the underlying "summary order", but also as to whether that "summary order" constitutionally shielded that "private opinion" from ever being used as precedential authority in a different stock option case. As the Eighth Circuit recently held in *Anastasoff, supra*, no court should be able to prevent its ruling from being used as precedential authority in any other applicable case, except perhaps for overriding reasons of national security.

Finally, certiorari should be granted, **for reasons of public policy**, in order to strike down, as unconstitutional,

those local court rules (such as the one utilized by the Second Circuit herein) which authorize it to issue a "private opinion" whenever the court elects to do so. Otherwise, rank speculation will continue to abound as to the "true reasons" as to why a particular decision may not be cited as precedential authority, and public confidence in the judiciary will be undermined.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND F. WOLK
Counsel of Record
ALFRED V. GRECO
MICHAEL B. WOLK
AMY E. KIRWAN
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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JUNE 15, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the FIFTEENTH day of JUNE, two thousand.

Present:

HONORABLE RALPH K. WINTER,
Chief Judge,

HONORABLE ROBERT D. SACK,
Circuit Judge,

HONORABLE WILLIAM TERRELL HODGES,*
District Judge.

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* The Honorable William Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix A

No. 99-9533

JOHN F. DOHERTY et al.,

Plaintiffs-Appellants,

– v. –

AMERICAN HOME PRODUCTS CORPORATION,

Defendant-Appellee.

* * *

Appeal from the United States District Court for the District of Connecticut (Burns, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

John F. Doherty and 196 similarly situated co-appellants appeal from Judge Burns's dismissal of their complaint. Appellants principally claim that appellee American Home Products Corporation ("AHP") breached their outstanding stock option agreements by limiting the terms of their options subsequent to a change of control transaction. The district court determined that the option terms were legitimately limited under the unambiguous language of the option agreements and dismissed appellants' complaint. We affirm.

Appendix A

All appellants were employed by Corometrics Medical Systems ("CMS"), a former subsidiary of AHP, and entered into stock option agreements with AHP under appellee's 1985 Stock Option Plan and/or 1990 Stock Incentive Plan (collectively, "Option Plans"). The Option Plans explicitly provided that "no Option may be exercised unless the optionee . . . is then employed by [AHP] or any of its subsidiaries and shall have been continuously employed by [AHP] or one or more of such subsidiaries since the date of the grant of his or her Option." Subsection (g) of the Option Plans did provide, however, that optionees would have the right to exercise their options for three years after AHP or one of its subsidiaries terminated their employment due to retirement or disability and for three months after AHP or one of its subsidiaries caused their termination for any other reason other than "deliberate gross misconduct."

In May 1994, AHP sold its interest in CMS. On April 11, 1994, AHP had sent appellants a letter stating:

> If you have exercisable stock options as of the sale date, options will continue to be processed in accordance with the Plan's terms. If you are eligible to retire from [AHP] as of the sale date . . . , your stock option expires on the earlier of three years from the sale date or the option's normal expiration date; you need not actually retire from [AHP] to have this three-year period in which to exercise the option. If you are not eligible to retire on the sale date, your stock options expire on the earlier of three months from the sale date or the option's normal expiration date.

Appendix A

Appellants filed the instant complaint alleging primarily that AHP's April 11 letter "amend[ed], revise[d] and/or discontinue[d]" their stock options issued pursuant to the Option Plans. The other allegations in the complaint preserved in this appeal are tortious interference with business opportunities and expectancies, intentional and negligent misrepresentation, negligence, and breach of fiduciary duty, all based upon the same alleged misconduct. The district court dismissed each of the pertinent counts on the pleadings.

We review *de novo*, *see, e.g.*, *McClellan v. Cablevision of Conn., Inc.*, 149 F.3d 161, 164 (2d Cir. 1998), accepting as true all facts alleged in the complaint and drawing all reasonable inferences in appellants' favor, *see, e.g.*, *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 43 (2d Cir. 1997). We also consider the Option Plans and April 11 letter because they are referenced in the complaint and form the sole basis for the complaint. *See International Audiotext Network, Inc. v. American Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991).

We agree with the district court that under the plain language of the Option Plans, appellants were entitled to exercise their options only while employed by a subsidiary of AHP. Thus, under the terms of the Option Plans, when AHP sold its interest in CMS, they were no longer entitled to exercise their options except as their rights might be extended under Subsection (g).

Appellants' arguments that the plain language of the Option Plans should not control are unpersuasive. Appellants

first argue that this case should be governed by the prevention doctrine, which excuses a condition of performance in a contract when a party wrongfully prevents the occurrence of the contract. *See, e.g., Haft v. Dart Group Corp.*, 877 F. Supp. 896, 903 (D. Del. 1995) (applying prevention doctrine when employer wrongfully dismissed fixed-term contract employee without cause). However, "the prevention doctrine does not apply where, under the contract, one party assumes the risk that fulfillment of the condition precedent will be prevented." *Mobile Communications Corp. of Am. v. MCI Communications Corp.*, No. 8108, 1985 WL 11574, at *4 (Del. Ch. Aug. 17, 1985). Here, appellants assumed the risk in the Option Plans that their right to exercise their options would be shortened or eliminated by their termination from an action by AHP, and as at-will employees they assumed the risk that they could be terminated without cause. AHP clearly had the right to sell its interest in CMS. Thus, the prevention doctrine does not apply. *Cf. Lieber v. Morton-Norwich Prods., Inc.*, No. 77 Civ. 4956, 1978 WL 1117, at *2 (S.D.N.Y. Sept. 29, 1978) (holding prevention doctrine inapplicable under Delaware law when option agreements required continuous employment by defendant's subsidiary, defendant sold interest in subsidiary, and plaintiffs were at-will employees).

Appellants note that the Iowa Supreme Court, interpreting Iowa law, refused to enforce an option agreement's provision that the options would terminate "[i]n the event OPTIONEE cease[d] to be an employee of [the defendant company] or any subsidiary thereof for any reason" after the defendant company sold its interest in its subsidiary "without prior notice thereof to the optionee." *Hilgenberg*

v. Iowa Beef Packers, Inc., 175 N.W.2d 353, 359, 361 (Iowa 1970) (quoting *Langer v. Iowa Beef Packers, Inc.*, 420 F.2d 365, 367, 369 (8th Cir. 1970) (interpreting Iowa law in parallel case)). We question whether the Delaware Supreme Court would extend its prevention doctrine and adopt the Iowa Supreme Court's reasoning. However, even assuming *arguendo* that it would, it is doubtful that appellants would be entitled to relief from the plain language of the Option Plans. Here, unlike in *Hilgenberg*, appellants were given prior notice of AHP's sale of its interest in CMS by the April 11 letter and afforded the opportunity to exercise their vested options. Indeed, in *Schwieger v. Iowa Beef Processors, Inc.*, 802 F.2d 1032 (8th Cir. 1986), the Eighth Circuit applied *Langer* and interpreted Iowa law in holding that where "plaintiffs attempted to exercise their option[s] *within three months of their termination*" in accordance with a provision of an option agreement strikingly similar to that in the instant case, but were prevented from doing so by various vesting provisions, plaintiffs should have been permitted to exercise. *Id.* at 1036 (emphasis added). Tellingly, the *Schweiger* opinion does not suggest that the plaintiffs had a right to exercise their options outside the three month window provided by the agreement.

Appellants also claim that various rules of contractual construction under Delaware law compel a contrary result. However, the language of the Option Plans is clear and unambiguous, and we therefore give that language its plain meaning without resort to rules of construction. *See Phillips Home Builders v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997) ("[I]f the relevant contract language is clear and unambiguous, courts must give the language its plain meaning.").

Finally, appellants claim that appellee breached various obligations of good faith and fair dealing by purposely drafting ambiguous language in the Option Plans with the intent of depriving them of their rights. Appellants argue that they are entitled to additional discovery to substantiate this claim. However, the Option Plans are not ambiguous, and AHP had the right both to sell its interest in CMS and to terminate appellants' employment at will and therefore never wrongfully deprived appellants of any contractual right. Thus, appellants' argument is meritless. *Cf. Sanders v. Devine*, No. Civ. A. 14679, 1997 WL 599539, at *6 (Del. Ch. Sept. 24, 1997) ("[T]he law is settled that where the terms of a contract expressly address the terms of a dispute, those express contractual terms — not an implied covenant of good faith and fair dealing — govern the parties' relations.").

We therefore affirm.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk

s/ Lucille Carr 6/15/00
By: Date

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED NOVEMBER 16, 1999, TOGETHER WITH THE UNDERLYING RULINGS ON WHICH THE JUDGMENT IS BASED, TO WIT: RULING DATED AND FILED OCTOBER 15, 1999 AND RULING DATED MARCH 30, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:97CV 1211 EBB

JOHN F. DOHERTY, et al

v.

AMERICAN HOME PRODUCTS CORP.

JUDGMENT

This cause came on for consideration before the Honorable Ellen Bree Burns, Senior, U.S.D.J., on Plaintiffs' Motion to Modify/Vacate Dismissal and Defendants motion for Summary Judgment on Count 7 and,

The Court having considered the motions and all the papers submitted in connection therewith, filed it's Ruling Denying Plaintiffs' Motion to Modify/Vacate Dismissal and granting defendants motion for Summary Judgment on Count 7,

It is therefore ORDERED and ADJUDGED that judgment shall enter for the defendants, Counts 1 through

six and eight having been dismissed previously, and this case is closed.

Dated at New Haven, Connecticut, this 16th day of November, 1999.

KEVIN F. ROWE, Clerk

By s/ Sharon Collins
Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:97-cv-1211 (EBB)

John F. Doherty, et. al.,

Plaintiffs,

v.

American Home Products Corp.,

Defendant.

Ruling on Plaintiffs' Motion to Modify/Vacate Dismissal and Defendant's Motion for Summary Judgment on Count 7

Plaintiffs seek to revive dismissed claims based on an alleged breach of a stock option agreement, and also move for summary judgment on one of those dismissed claims. Defendant moves for summary judgment on the one claim, for age discrimination, that survived the 12(b)(6) ruling. Even though plaintiffs' request for reconsideration is nearly six months late, the Court has reexamined the dismissal and declines to modify it. In addition, since plaintiffs failed to file an administrative claim — a prerequisite to sustaining a cause of action for age discrimination in federal court — defendant's motion for summary judgment is granted.

Appendix B

Background

Plaintiffs are a group of 197 stock option holders who are employed by Corometrics Medical Systems ("CMS"), a former subsidiary of defendant American Home Products Corporation ("AHP"). In connection with their employment with CMS, plaintiffs were issued options, which ranged in price from $60.88 to $94.44, to buy shares of AHP, the parent company of CMS. In May 1994, AHP sold its controlling interest in CMS to Marquette Electronics, Inc. Prior to the sale, by a letter dated April 11, 1994, AHP informed plaintiffs that it would honor unexpired options issued to retirement-eligible employees (i.e., those who had five years of continuous service and were at least 55 or older) for up to three years after the sale; option holders who were not retirement-eligible were given three months after the sale to exercise their options. Options held by the latter group were rendered worthless because AHP shares traded below the lowest option price for the three months after the sale of CMS in May 1994. During the three-year period following the sale, however, AHP stock ranged from $50 to $112.25/share, peaking well-above the highest option price in April 1996.

Plaintiffs, including both retirement-eligible and non-retirement-eligible option holders, initially brought this action in state court in May 1997 at the end of the three-year period during which plaintiffs could still exercise their options. Defendant removed the action to this Court based on plaintiffs' age discrimination claim, 29 U.S.C. § 626.[1]

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1. The complaint did not specifically invoke the federal age discrimination statute, 29 U.S.C. §§ 621 *et. seq.* *See* Complaint ¶ 61. Defendant, however, successfully removed the case based on this claim without objection. *See* Notice of Removal ¶ 4.

Appendix B

In a summary order adopting defendant's memorandum, this Court granted — without leave to amend the complaint — defendant's rule 12(b)(6) Motion to Dismiss Counts One Through Six and Eight on March 30, 1998.

I. *Plaintiffs' Motions*

Plaintiffs brought this motion to vacate/modify — in essence, a motion to reconsider the Court's earlier ruling — six months after the dismissal, reiterating their claim that CMS employees' ability to exercise outstanding options was prematurely terminated by AHP without their consent as required by the stock option agreements. Although plaintiffs' motion is time-barred, *see* Local Rule 9(e) ("Motions for Reconsideration shall be filed and served within ten (10) days of the filing of the decision or order from which such relief is sought . . . ."), the Court recognizes its authority under rule 54(b) to amend its ruling on the dismissed claims. *See* Fed. R. Civ. P. 54(b) ("any order or other form of decision, however designated, which adjudicates fewer than all of the claims . . . is subject to revision at any time before the entry of judgment adjudicating all the claims"). Discretion to modify the ruling will not be exercised, however, because, even after a second look, the Court finds no cognizable claim upon which relief may be granted.

A. *Standard of Review*

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) must be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73,

104 S. Ct. 2229, 2232, 81 L. Ed. 2d. 59 (1984). In considering a motion to dismiss, the Court accepts all factual allegations of the complaint as true and draws all reasonable inferences in favor of the non-moving party. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d. 80 (1957).

The Court may look beyond the four corners of the complaint to consider documents referenced therein without converting a motion to dismiss into a motion for summary judgment. *See International Audiotex Network, Inc. v. Am. Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) ("Moreover, 'when a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint,' the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment.") (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)).

Accordingly, the Court examines the stock plans and option agreements that are integral to the complaint, and upon which plaintiffs rely, to determine if the facts as alleged would support any of plaintiffs' claims. They do not.

B. *Discussion*

1. *Plaintiffs' Claims*

Plaintiffs plead their case in eight counts, all related to the defendant's alleged "unilateral termination" of the stock options issued to CMS employees. Count One for breach of

contract based on the April 11, 1994, letter regarding the pending sale of CMS, is plaintiffs' chief claim and the one on which they move for summary judgment if the claim is reinstated. The other dismissed claims were for tortious interference with business opportunities and expectancies, intentional and negligent misrepresentation, negligence, and breach of fiduciary duty. Count Seven for age discrimination was not dismissed, but is now ready for decision as a matter of law on defendant's motion for summary judgment. *See* section II, *infra*.

2. *The Stock Option Plans and Agreements*

Plaintiffs were issued options under two different stock option plans, the 1985 Stock Option Plan (amended in 1988) and the 1990 Stock Incentive Plan (the "Plans"), the material terms of which do not differ. The Stock Option Agreements ("Agreements"), single page preprinted contracts signed by the optionee and AHP's chairman, expressly incorporate the Plans by reference. Under both the Plans and the individual Agreements, optionees' right to exercise is conditioned upon their employment with AHP or one of its subsidiaries. The unequivocal terms of the Agreements and Plans, therefore, preclude plaintiffs' claims as a matter of law.

The Agreements each clearly state in the second sentence that options may be exercised after one year from the date of grant "provided the optionee is then in the employ of the Corporation [AHP] or any of its subsidiaries." When AHP sold its interest in CMS, plaintiffs were no longer employed by AHP or one of its subsidiaries. Therefore, the options, and any rights CMS employees had under the Agreements,

expired on the date AHP sold its subsidiary CMS. Each of the stock option Plans, whose relevant terms are identical, also includes language predicating the exercise of options on employment with AHP or one of its subsidiaries.

The Plans detail the conditions under which the options may be exercised. As in the Agreements, Section 5(f) of the Plans provides that "no Option may be exercised unless the optionee, except as provided in paragraph (g) of this Section, is then employed by the Company or any of its subsidiaries." The term "Company" is defined in the first sentence of the Plans as American Home Products Corporation. Section 5(g) provides the only escape hatch from the binding terms of section 5(f), and AHP's sale of its CMS subsidiary is not among those contingencies contemplated in section 5(g).

Section 5(g) enumerates several events, the occurrence of any one of which terminates an unexercised option prior to the basic termination date printed in the Agreement. *See* § 5(g)(i). These termination events relate only to the option holder's employment status, not to AHP's ownership of its subsidiaries. For example, option holders under the Plans have up to three years to exercise their options in the event they retire, become disabled or die. *See* §§ 5(g)(ii, iii). Those who are separated from the Company for a reason other than retirement, disability or death, have up to three months after leaving to exercise, *see* § 5(g)(iv); provided that they did not quit or were not terminated for gross misconduct, in which case their options expire immediately. *See* §§ 5(g)(v, vi). All option holders' rights are further qualified by their cooperation with AHP, and their agreement not to compete with the Company or deliberately cause it substantial harm. *See* § 5(g)(vii).

Nothing in subsection 5(g) mitigates the express language of section 5(f), which conditions the exercise of options upon the holder's employment with the "Company [AHP] or any of its subsidiaries." Because the option holders were no longer employed by AHP or one of its subsidiaries after the sale of CMS, their rights were extinguished on the date of sale in May 1994. That AHP gave CMS option holders between three months and three years to exercise otherwise void options, a gratuitous gesture not required by the terms of the Agreements or Plans, does nothing to preserve the options beyond those dates.

Accepting plaintiffs' factual allegations as true, and drawing all reasonable inferences in their favor, plaintiffs have failed to state a claim upon which relief may be granted. In fact, plaintiffs' claims are directly contradicted by the very documents — the stock option Agreements and Plans — upon which they purport to rely. For these reasons, the Court declines to vacate or modify its dismissal of counts one through six and eight.[2]

II. *Defendant's Motion for Summary Judgment*

Defendant AHP moves for summary judgment on the sole remaining count for age discrimination because plaintiffs did not file the requisite administrative claim with the Equal Opportunity Employment Commission ("EEOC"). Shortly

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2. The Court's denial of plaintiffs' motion to vacate/modify obviates the need to consider two of their related motions. Plaintiffs' motion for summary judgment on one of the dismissed claims, and motion to file a memorandum in excess of 40 pages in support thereof, are therefore dismissed as moot.

after this Court issued its ruling on defendant's motion to dismiss, defendant served requests for admission seeking a response from plaintiffs as to whether they had filed an administrative claim prior to filing their complaint. Plaintiffs were granted three extensions of time to respond until September 1, 1998, which was to be the "*final* extension." *See* Order of Aug. 4, 1998 (granting plaintiffs' motion for a further extension of time to respond to defendant's discovery requests).[3]

After the September 1st deadline passed without a response, defendant filed the instant motion, arguing that summary judgment was appropriate because, under Fed. R. Civ. P. 36(a), the requests were now deemed admitted. On October 5, 1998 — nearly six months after the requests were first made and some five weeks after the third and final deadline expired — plaintiffs belatedly sought to further "stay" discovery on count seven.[4]

A. *Standard of Review*

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and

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3. In their opposition to this motion, plaintiffs erroneously state that the final extension was granted through September 28th. That date was endorsed as the time when all dispositive motions were due. Plaintiffs own request clearly indicated September 1, 1998, as the date when discovery responses were due.

4. Because the Court finds defendant's motion for summary judgment dispositive, it need not consider plaintiffs' mislabeled motion to extend the stay of discovery, which is dismissed as moot.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). The Supreme Court has clearly set out the standard for summary judgment where plaintiff has failed to sustain an essential element of the claim:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Accordingly, defendant's motion will be considered in light of plaintiffs' failure to file an administrative claim, an essential element of a federal cause of action for age discrimination.

Appendix B

B. *Discussion*

1. *Rule 36(a) Admission*

Under the Federal Rules, requests for admission are deemed

> admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney.

Fed. R. Civ. P. 36(a); *see also Apex Oil Co. v. Belcher Company of New York, Inc.*, 855 F.2d 1009, 1015 (2d Cir. 1988) ("The matter is deemed admitted, unless within thirty days of the request the party to whom the request is directed serves upon the requesting party a written answer or objection concerning the matter.").

Among the vital purposes of this rule is "to facilitate proof with respect to issues that cannot be eliminated from the case." Fed. R. Civ. P. 36 advisory committee's note (1970). As such, the rule prevents an unresponsive party's intransigence from prejudicing the party making the request. *See id.* ("Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove [or defend] the very matters on which he has secured the admission, and the purpose of the rule is defeated.").

Here, the question of whether plaintiffs filed an administrative claim, an essential element of their prima facie case, is clearly just such an issue that would prejudice defendants if left in limbo. In their opposition to defendant's motion for summary judgment, plaintiffs nowhere even assert that the requisite administrative claims were ever filed. Because plaintiffs failed to respond to defendant's request for admissions — after three successive extensions of time — those requests are therefore deemed admitted under rule 36(a).

2. *Age Discrimination and the EEOC*

Filing an administrative claim with the EEOC is an essential element required by statute to sustain a federal cause of action for age discrimination:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed . . . (d)(2) within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 626(d);[5] *see also Miller v. Int'l Tel. and Tel. Corp.*, 755 F.2d 20, 23 (2d Cir. 1985) ("No action based on a claim of age discrimination may be brought in federal court unless the claim was properly raised with the EEOC . . . .").

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5. The 300 day period of subsection (d)(2) applies here because Connecticut is a so-called deferral state under § 633(b).

Appendix B

Plaintiffs' failure to file the requisite administrative claim with the EEOC is fatal to their age discrimination claim. Although the Court recognizes its equitable power to toll the period for filing a claim where a claimant was deliberately prevented from exercising his rights, this case presents no such "extraordinary" circumstance. *Id.* at 24 ("An extraordinary circumstance permitting tolling of the time bar on equitable grounds might exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory.").

Defendant's Motion for Summary Judgment on Count Seven [Doc. No. 25] is therefore granted. In addition, plaintiffs' Motion to Vacate/Modify [Doc. No. 31] is denied. Furthermore, plaintiffs' Motion to Extend the Stay of Discovery on Claim 7 [Doc. No. 30], Motion for Leave to File a Memorandum of Law in Excess of 40 Pages [Doc. No. 29], and Motion for Summary Judgment [Doc. No. 31, part 2] are dismissed as moot.

SO ORDERED.

s/ Ellen Bree Burns
Ellen Bree Burns
Senior District Judge

Dated at New Haven, Connecticut, this 15th day of October, 1999.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:97CV1211 (EBB)

JOHN F. DOHERTY, ET AL.,

Plaintiffs

v.

AMERICAN HOME PRODUCTS CORP.

Defendants

RULING ON MOTION TO DISMISS

The Court has thoroughly reviewed the Motion to Dismiss, Defendant's Memoranda of Law, the exhibits annexed thereto, and the April 11, 1994 Letter to All Nonunion U.S. Employees of Corometrics Medical Systems, Inc. from Senior Vice-President Joseph J. Carr. *See Cortec Industries Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991) *cert. denied*, 503 U.S. 960 (1992) (court may go outside four corners of complaint under Rule 12(b)(6) Motion without turning Motion into one under Rule 56 if: (1) plaintiffs have either had the documents in their possession or have knowledge thereof; and (2) plaintiffs relied on the documents in bringing suit).

Plaintiffs' responsive papers have also been thoroughly analyzed. Following such scrutiny, the Court hereby

Appendix B

GRANTS the Motion to Dismiss Counts One through Six and Eight [Doc. No. 9] for the reasons set forth in Defendant's Motion to Dismiss and Memoranda of Law in support thereof.

Leave to amend is DENIED.

SO ORDERED

s/ Ellen Bree Burns
ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut this 30th day of March, 1998.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 4, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4 day of August two thousand.

Dkt No: 99-9533

John F. Doherty, et. al.,

Plaintiffs-Appellants,

v

American Home Products Corp.

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants John F. Doherty, et. al.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D — REPRESENTATIVE EXAMPLE OF FULLY EXECUTED STANDARDIZED FORM OF STOCK OPTION AGREEMENT EXECUTED BY RESPONDENT AND ONE OF THE PETITIONERS

AMERICAN HOME PRODUCTS CORPORATION STOCK OPTION AGREEMENT

JOHN F DOHERTY
21 BIRCH DRIVE
WALLINGFORD CT 06492

UNDER 1990 STOCK INCENTIVE PLAN

DATED 06/24/93

OPTION PRICE $65.1875

INCENTIVE STOCK OPTION
SHARES 1,500
BASIC TERMINATION DATE 6/24/03*

NON-QUALIFIED STOCK OPTION
SHARES 500
BASIC TERMINATION DATE 6/24/03*

1. Under the terms and conditions of this Agreement and of the American Home Products Corporation's 1990 Stock Incentive Plan, or amended 1985 Stock Option Plan, as specified above, a copy of which is attached hereto and incorporated herein by reference, the Corporation hereby grants to the optionee named above an option or options to

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* Or as otherwise provided in Section 5 of the Plan.

purchase the number of shares of the Corporation's common stock as specified above opposite the optionee's name at the price also above specified.

2. These options may be exercised one year from the date hereof, or within one year in the case of retirement, either in whole at any time or in part from time to time in full shares, provided the optionee is then in the employ of the Corporation or any of its subsidiaries and has been continuously so employed since the date the options were granted, or under certain circumstances up to, but in no event more than, three years after the optionee's termination of employment, subject to the condition of non-competition in Section 5(g)(vii) of the applicable Plan, further provided, that the optionee has, at the date of exercise, been in the continuous employment of the Corporation and/or one or more of its subsidiaries for at least two years, and still further provided, that any Incentive Stock Option granted hereby shall become exercisable for the first time in the aggregate amount of no more than $100,000 (fair market value at time of grant) during any calendar year. These options may be exercised within one year in the case of disability or death providing the optionee has been in the continuous employment of the Corporation for at least two years.

3. These use options may be exercised by sending the Treasurer of the Corporation an option exercise notice indicating the number of shares for which the option is to be exercised at that time and the form in which the certificates are to be registered for shares purchased (in the name of the optionee or in his or her name and that of another person(s) as joint tenants with the right of survivorship). This notice

shall be accompanied by a personal or bank check in U.S. Dollars payable to American Home Products Corporation and drawn on or payable at a United States bank and/or shares of the Corporation's common stock issued in the optionee's name and duly assigned to the Corporation or by any other form of consideration which has been approved by the Compensation and Benefits Committee, as and to the extent provided and permitted by Section 5(d) of the applicable Plan, for the full purchase price of the number of shares.

4. This Agreement and these options as well as the Corporation's obligation to sell and deliver stock covered by these options is subject to all federal, state and other laws, rules and regulations of the United States and/or of the country wherein the optionee resides. Compliance with any recording, protocolization or registration requirements and payment of any fees or taxes applicable to this Agreement or the transactions it contemplates are the exclusive responsibility of the optionee.

5. These options are not transferable or assignable other than by will or by the laws of descent and distribution and may be exercised during the optionee's lifetime only by him or her. After the optionee's death the option may be exercised only by the optionee's legal representative or legatee or such other person designated by an appropriate court as the person entitled to make such exercise. The option may be exercised after the optionee's death only to the extent that he or she was entitled to exercise it at the time of his or her death.

6. Subject to the express provisions of the applicable Plan, this Agreement and such Plan are to be interpreted and

administered by the Compensation and Benefits Committee, whose determination will be final.

7. This Agreement shall be governed by the laws of the State of Delaware and in accordance with such Federal law as may be applicable.

Accepted and agreed to:

s/ John F. Doherty 7/26/93
Optionee's Signature

049-38-0342 20-05-5040
Optionee's Social Security Number

AMERICAN HOME PRODUCTS CORPORATION

s/ John R. Stafford
Chairman of the Board

APPENDIX E — LIST OF PETITIONERS

John F. Doherty, Ignacio Alzcorbe, James P. Allen, Eugene V. Altman, Charles Anglin, Felix A. Arbelo, Sharon Avinger, Evelyn Bakertges, Elwood E. Bales, Robert Barnes, John M. Bassett, Gilito Belmonte, Elwood E. Bales, George Besek, Leonard Bienasz, Jr., Shinichi Boman, Miguel A. Bonilla, Richard E. Bonne, Leo Boudreau, Scott J. Brickner, Guy D. Brown, Jack F. Burton, Neil Burton, Nancy E. Callahan, Curtis C. Campbell, Stephen K. Cannon, Franklin Carey, Jr., Robert L. Carper, Tommy Cheater, Claudia Cole, Larry E. Collier, Harold Condosta, Sr., Anthony Cop, Thomas Cox, Ann Crocco, Robert F. Daber, Patrick D'Alessandro, Richard S. Danielle, Stanley Darmofalski, Sr., Donald M. Dezenso, Robert K. Dings, Michael J. Dinneen, Scott M. Disbrow, Karen A. Dorsey, Steve Dufour, Charles Dwyer, Benjamin J. Eckles, Jr., Donald W. Emeigh, Barton English, Frank Esposito, David J. Eversman, David R. Faiglietti, David E. Fenske, Judith E. Fisher, Rudy L. Flores, Maria Vitug Fouts, Mark Freeman, George V. Garrett, Gregory Geremia, Walter Gordon, Lester Grant, Robert Gregory, James D. Grundy, Diana Gumas, Kenneth E. Gustafson, Thomas Harar, Jeffrey W. Haynes, Michael J. Healey, Juergen Heffter, Thomas Hock, John C. Hoelck, Neal J. Hoffberg, Ann Chuber Hoffman, Leonard M. Hottin, Raymond J. Huey, Megan E. Hughes, Robert Imobersteg, Joseph Izzo, Charles A. Johnson, David Craig Johnson, Eric K. Johnson, J. Michael Jordan, Mark L. Kelly, Michael Kelly, Grey D. Kimball, Margaret Foster Kinder, Steve Klapperich, Thomas Klinda, Terence H. Koong, Lisa Koppenhotel, Robert David Koppenhoter, David Kortum, Thomas Leonard Kosloski, William M. Kosturko, John Kubilus, William A. Kutsche, Marilyn R. Lapidus, Gary R. Laude, Barry Thomas Lechner, Debra A. Legge, Bruce A. Lennon, Stan Lepeak,

Appendix E

Paul A. Levesque, Daniel R. Long, Gustave A. Lopez, Robert K. Lynn, Matthew J. Lyons, Jr., Joseph Mancarini, Jr., Mark A. Mancini, Anthony Marcantonio, Mark J. Matarewski, George V. McBride, Barbara M. McCarthy, Dennis A. McClinton, Michael K. McLaughlin, William McMillion, Jr., John Frederick Metz, Sherril L. Meunler, Malia C. Michaeledes, Joseph C. Mideke, Richard G. Miller, Jeffrey S. Monroe, Robert Moreno, Charles F. Morro, Janice Moyers, Danielle C. Murphy, William A. Murray, Eleanor S. Muss, Irene Y. Neelon, Richard Nelson, Linda A. Nestor, Clarence W. Nix, Kenneth Notti, Matthew Oblon, Robert J. O'Connell, Kerry M. O'Connor, Ira B. Packard, Walter E. Palkowski, John E. Parker, Jane L. Paulkovich, Jim Pecque, Andrew M. Pelletier, Renato S. Perez, Thomas J. Perzan, Samuel J. Pettus, Cynthia Piodoti, William Pruehsner, Dennis J. Pyskaty, Daniel A. Rapoport, Carl Rizzo, James R. Robinson, David S. Rolka, Rebecca M. Rose, Walter C. Rosene, Timothy J. Rutledge, David Sanford, Ernest Scinto, Jr., David Seebauer, Richard Earl Seymour, Chris Shaft, David J. Shine, Christina I. Skinner, Kevin J. Smith, William B. Smith, Steven D. Snoposki, Douglas Soerenson, James F. Sokosky, Dennis Spurlock, Melinda A. St. John, Peter Stanforth, Mark Stega, Joel A. Stettler, Paul J. Strilka, Susan C. Strong, Rudolph E. Suhl, Michael W. Szostek, John Theune, Simon Thomas, Bernice Tillotte, Linda Tomczyk, Jeffrey A. Trevaskis, Harry M. Triebel, Lynn Wolfe Triebel, William Ward Trowbridge, John D. Venter, Camillo Verna, Linda A. Viera, Avis A. Vincensi, Howard A. Waller, Diane M. Walsh, Gary S. Westbrook, Nathaniel Wilson, Christopher S. Wood, Gerald G. Woodward, Susan Young, Russell C. Zaccari, Jr., Jerry Hill

Supreme Court, U.S.
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NO. 00-694

In The

Supreme Court Of The United States

JOHN F. DOHERTY, *et al.*,

Petitioners,

v.

AMERICAN HOME PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 00-694

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JOHN F. DOHERTY, *et al.*,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE[1]

This case involves the application and enforcement of unambiguous terms of stock option plans and stock option agreements entered into by at-will employees. In their complaint, petitioners alleged that they or their predecessors-in-interest were employees of Corometrics Medical Systems, Inc. ("Corometrics"), a subsidiary of American Home Products Corporation ("AHPC"). Until 1994, AHPC was the controlling majority shareholder of Corometrics. Prior to AHPC's sale of Corometrics stock to Marquette Electronics, Inc. ("Marquette") in May 1994, petitioners – or their predecessors-in-interest – entered into employee stock option agreements with AHPC pursuant to which they were entitled to purchase AHPC's corporate stock.

Petitioners' complaint alleged that their respective rights as optionees were governed by two stock option plans – a 1985 Stock Option Plan (as amended in 1988) and a 1990 Stock Incentive Plan (collectively, the "Stock Option Plans"). (See Opposition to Petition for Writ of Certiorari ("Opposition to Petition"), A2-A32.) Pursuant to these Stock Option Plans, petitioners or their predecessors-in-interest, as optionees, executed various stock option agreements entitling them to purchase AHPC corporate stock. The stock option agreements entered into by petitioners (collectively, the "Stock Option Agreements") expressly incorporate the terms and conditions of the stock option plan under which the agreement was entered. (Petition for Writ of Certiorari ("Petition"), App. D at 26a.) Petitioners alleged that each of the Stock Option Agreements at issue in this action was entered into pursuant to either the

---

[1] Respondent does not have any parent corporation, and no publicly-held corporation owns 10% or more of respondent's stock. Sup. Ct. R. 29.6.

1985 Stock Option Plan or the 1990 Stock Incentive Plan, and that the terms of the applicable Plan govern their contractual rights and obligations.

The Stock Option Plans expressly set forth the conditions on an optionee's right to exercise an option issued pursuant to the Plans. For example, Section 5(f) of each Plan provides:

> One year after the date of grant of the Option, the optionee may exercise the Option at any time or in part from time to time provided that the optionee has, at the date of exercise, been in the continuous employment of the Company and/or one or more of its subsidiaries for at least two years. *Notwithstanding the foregoing, no Option may be exercised unless the optionee, except as provided in paragraph (g) of this Section, is then employed by the Company or any of its subsidiaries and shall have been continuously employed by the Company or one or more of such subsidiaries since the date of the grant of his or her Option. . . .*

(Opposition to Petition at A6, A21 (emphasis added).) Section 5(g) of the Stock Option Plans then provides for several exceptions to the requirement that only *existing* employees of AHPC or of an AHPC subsidiary may exercise an option. Under this section, options could be exercised for a certain period after the termination of an optionee's employment in accordance with the following provisions:

> (ii) Three years after termination of the optionee's employment by the Company or its subsidiaries due to retirement or disability

> during which three year period the optionee may exercise the Option to the extent he or she was entitled to exercise it at the time of such termination; . . .
>
> (iv) Three months after termination by the Company or one of its subsidiaries of the optionee's employment for any reason other than retirement, disability or deliberate gross misconduct during which three month period the Option may be exercised by the optionee to the extent the optionee was entitled to exercise it at the time of such termination; . . .

(Id. at A7-8, A21-22.) These exceptions were further limited by other provisions of Section 5(g), including Section 5(g)(i). (Id. at A7, A21.)

The Stock Option Agreements entered into pursuant to the Plans repeat the requirement that an optionee must be an employee of AHPC or of an AHPC subsidiary in order to exercise his or her option. (Petition, App. D at 27a.) Taken together, the Stock Option Plans and Stock Option Agreements provide that, in order to exercise an option, an individual must be an employee of AHPC or an AHPC subsidiary at the time an option is to be exercised, or must fall within one of the exceptions set forth in Section 5(g) of the Stock Option Plans.

Petitioners alleged that prior to AHPC's sale of Corometrics, AHPC sent a letter to non-union U.S. employees of Corometrics, briefly explaining the status of each employee's AHPC benefits. Petitioners claimed, without any reasonable factual or legal basis, that this letter improperly limited the period in which Corometrics

employees could exercise stock options pursuant to the Stock Option Plans.[2]

On July 16, 1997, respondent moved to dismiss all but one count of petitioners' complaint. The principal ground for the motion was that, based on the unambiguous terms of the Stock Option Agreements and Stock Option Plans, these counts failed to state a claim upon which relief could be granted. On March 30, 1998, the District Court granted AHPC's motion to dismiss, without leave to amend, in its entirety. Upon reconsideration, in a ruling dated October 15, 1999, the District Court reaffirmed its dismissal of petitioners' claims and further granted summary judgment as to the only remaining claim of their complaint. On June 15, 2000, after *de novo* review, the Second Circuit affirmed the District Court's dismissal in its entirety.

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[2] Petitioners inaccurately assert in their Petition that they each had secured a "vested" contractual right to buy respondent's stock by the time respondent sold its stock interest in Corometrics. Petitioners made no such allegation in their complaint, nor could they. Petitioners also claim that respondent notified petitioners that the vested stock options would not be honored following the sale of Corometrics. (Petition, at 3.) In fact, respondent informed the optionees that they would be given the benefit of the three-year or three-month exception (whichever was applicable) set forth in Section 5(g) of the Stock Option Plans.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Does Not Conflict With The Decision Of Any Other Circuit.

Petitioners inaccurately claim that the Second Circuit's ruling is in "direct conflict" with the Eighth Circuit's decision in Langer v. Iowa Beef Packers, Inc., 420 F.2d 365 (8th Cir. 1970). The instant case is based on Delaware law; Langer is based on Iowa law. Thus, there is no conflict among the circuits over the application of the same law.

In affirming the District Court's decision, the Second Circuit simply applied the terms of the Stock Option Agreements as written. Under Delaware law, parties are bound by the terms of their agreement. Haft v. Dart Group Corp., 841 F. Supp. 549, 564 (D. Del. 1993) (applying Delaware law). Courts are to read a contract as a whole and give its provisions their ordinary meaning. Id. The intent of the parties must be ascertained from the language of the contract, Citadel Holding Corp. v. Roven, 603 A.2d 818, 822 (Del. 1992), and extrinsic evidence is not to be used to interpret contract language where that language is "'plain and clear on its face.'" E.I. du Pont de Nemours & Co. v. Allstate Insurance Co., 693 A.2d 1059, 1061 (Del. 1997) (citation omitted); see also Rhone-Poulenc Basic Chemicals Co. v. American Motorists Insurance Co., 616 A.2d 1192, 1196 (Del. 1992) ("Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.")

Here, the Second Circuit correctly determined that the terms of the Stock Option Agreements at issue were clear and unambiguous, and that they defeated petitioners' claims as a matter of law. The court of appeals found that

> under the plain language of the Option Plans, appellants were entitled to exercise their options only while employed by a subsidiary of AHP. Thus, under the terms of the Option Plans, when AHP sold its interest in [Corometrics], they were no longer entitled to exercise their options except as their rights might be extended under Subsection (g).

(Petition, App. A at 4a.)

In so holding, the Second Circuit considered, and correctly rejected, petitioners' argument for application of the "prevention doctrine." The Court ruled the prevention doctrine did not apply because respondent did not *wrongfully* prevent the occurrence of a condition precedent in the Stock Option Agreements. (Petition, App. A at 5a; see also Mobile Communications Corp. of America v. MCI Communications Corp., No. 8108, 1985 WL 11574, *4 (Del. Ch. Aug. 17, 1985).) As the Court recognized, respondent simply sold its interest in Corometrics, which it indisputably had the right to do. (Petition, App. A at 5a.) Moreover, the petitioners, as at-will employees, had no right to continued employment, and respondent was permitted, under the contracts at issue, to take actions that would terminate the petitioners' status as employees. (Id.) Thus, based on Delaware law, the Second Circuit properly found that the prevention doctrine has no application to the facts of this case. See Liebler v. Morton-Norwich Products, Inc., No. 77 Civ 4956, 1978 WL 1117 (S.D. N.Y. Sept. 29, 1978) (holding prevention doctrine inapplicable under Delaware law when option agreements required continuous employment by defendant or one of its subsidiaries for at least one year after the date of grant, defendant sold interest in subsidiary prior to that time and plaintiffs were at-will employees); Mobile Communications, 1985 WL 11574, *4 ("the prevention

doctrine does not apply where, under the contract, one party assumes the risk that fulfillment of the condition precedent will be prevented.")[3]

In their attempt to create a conflict among the circuits, petitioners cite cases decided under non-Delaware state law and then argue that these cases "conflict" with the Second Circuit's decision based on Delaware law. This claim is meritless. The decisions upon which petitioners principally rely – Langer, Hilgenberg v. Iowa Beef Packers, Inc., 175 N.W.2d 353 (Iowa 1970) and Schweiger v. Iowa Beef Processors, Inc., 802 F.2d 1032 (8th Cir. 1986), reh'g denied, 816 F.2d 1217 (8th Cir. 1987) – are based on Iowa state law. Obviously, the Second Circuit's application of Delaware law does not create a conflict with another circuit's application of a different state's law.[4]

---

[3] The lone Delaware case cited by petitioners on this issue, Haft v. Dart Group Corp., 877 F. Supp. 896 (D. Del. 1995), is consistent with the rule that a condition to performance is excused only where a party *wrongfully* prevents the occurrence of the condition. Id. at 903 (where employer breached fixed-term employment contract by terminating employee without cause, and thus wrongfully terminated employment contract, employer could not rely on termination provision in separate stock option agreement to cut off employee's right to exercise his stock options).

[4] Moreover, the Second Circuit noted that even if Iowa law had applied in this case, "it is doubtful that appellants would be entitled to relief from the plain language of the Option Plans." (Petition, App. A at 6a.) The Court acknowledged that, unlike in Hilgenberg, the petitioners in this case "were given prior notice of [respondent's] sale of its interest in [Corometrics]" and were afforded an opportunity to exercise their options. (Id.)

Petitioners also suggest that the Second Circuit's decision is in "apparent conflict" with the decisions in several other circuits. Petitioners fail to cite any case which would support this statement. In particular, respondent notes that Ballard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975), is fully consistent with the rule that the prevention doctrine applies only where a party *wrongfully* prevents the occurrence of a contractual condition to performance. Id. at 903-04 (applying prevention doctrine where plaintiff – who had contract under which he could be terminated only for "just cause" – was wrongfully terminated prior to the end of the contract term.) In short, petitioners have failed to present any compelling reason for this Court to grant the requested writ of certiorari.[5]

---

[5] Petitioners also claim the Second Circuit erred by dismissing their claims on the pleadings. Petitioners argue they were entitled to discovery on their claim that respondent breached obligations of good faith and fair dealing by purposely drafting ambiguous language in the Stock Option Plans. First, petitioners' suggestion that they made uncontroverted allegations of bad faith mischaracterizes the record; they did not even raise this issue until after the District Court had dismissed their claims, when they filed an improper motion for summary judgment on one of these previously-dismissed claims. Moreover, as both the District Court and the Second Circuit found, the Stock Option Plans are *not* ambiguous; thus, as a matter of law, there is no basis for a claim that respondent breached an obligation of good faith and fair dealing by drafting ambiguous contract language. (Petition, App. A at 7a.; see also Sanders v. Devine, No. Civ. A. 14679, 1997 WL 599539, at *6 (Del. Ch. Sept. 24, 1997) ("[T]he law is settled that where the terms of a contract expressly address the terms of a dispute, those express terms – not an implied covenant of good faith and fair dealing – govern the parties' relations."))

II. Petitioners Do Not Have Standing To Challenge The Second Circuit's "Summary Order" Rule.

Petitioners also seek a writ of certiorari based on the Second Circuit's designation of its opinion in this case as a "Summary Order." Petitioners have no standing to challenge the constitutionality of the Second Circuit's "Summary Order" rule. A plaintiff must meet three requirements to have standing under Article III of the Constitution. It must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S.Ct 693, 704 (2000).

Here, petitioners do not – and cannot – allege a cognizable injury to themselves resulting from the Second Circuit's designation of its opinion as a "Summary Order." The Second Circuit's designation merely means that the order may not be cited as precedential authority in *future* cases. It has no effect whatsoever on petitioners' substantive rights. Thus, petitioners have suffered no 'injury in fact' that could be redressed by declaring the Second Circuit's "Summary Order" rule unconstitutional.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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NO. 00-694

In The
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v.

AMERICAN HOME PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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APPENDIX

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APPENDIX TABLE OF CONTENTS

1985 STOCK OPTION PLAN A2

1990 STOCK INCENTIVE PLAN A16

American Home Products Corporation

1985 STOCK OPTION PLAN

(As amended by the Board of Directors and/or approved by stockholders through April 25, 1991.)

Section 1. **Purpose.** The purpose of the 1985 Stock Option Plan (the "Plan") is to provide favorable opportunities for officers and other key employees of American Home Products Corporation (the "Company") and its subsidiaries to purchase shares of Common Stock of the Company or to benefit from the appreciation thereof. Such opportunities should provide an increased incentive for these employees to contribute to the future success and prosperity of the Company, thus enhancing the value of the stock for the benefit of the stockholders, and increase the ability of the Company to attract and retain individuals of exceptional skill upon whom, in large measure, its sustained progress, growth and profitability depend.

Pursuant to the Plan, options to purchase the Company's Common Stock may be granted by the Company which shall have a term of ten years from the date of grant for non-qualified stock options and for incentive stock options as hereinafter defined for such term as shall be determined by the Committee (hereinafter defined) not exceeding ten years from the date of grant (the "Option" or "Options"), Options granted under the Plan may be either incentive stock options, as defined in Section 422A(b) of the Internal Revenue Code, or options which do not meet the requirements of said Section 422A(b) of the Code, herein referred to as non-qualified stock options.

It is intended, except as otherwise provided herein, that incentive stock options may be granted under the Plan and that such incentive stock options shall conform to the requirements of Sections 422A and 425 of the Internal Revenue Code and to the provisions of this Plan and shall otherwise be as determined by the Committee and, to the extent provided in the last sentence of Section 2 hereof, approved by the Board of Directors. The terms "subsidiaries" and "subsidiary corporation" shall have the meanings given to them by Section 425 of the Internal Revenue Code. All section references to the Internal Revenue Code in this Plan are intended to include any amendments or substitutions therefor in such Code subsequent to the adoption of the Plan.

Section 2. **Administration.** The Plan shall be administered by a Stock Option Committee (the "Committee") consisting of three or more members of the Board of Directors of the Company who are not employees. The Committee shall have full authority to award Options and Stock Appreciation Rights, to interpret the Plan and to make such rules and regulations and establish such procedures as it deems appropriate for the administration of the Plan, taking into consideration the recommendations of management. The decisions of the Committee shall be binding and conclusive for all purposes and upon all persons unless and except to the extent that the Board of Directors of the Company shall have previously directed that all or specified types of decisions of the Committee shall be subject to approval by the Board of Directors.

Section 3. **Number of Shares.** The total number of shares which may be sold under the Plan and for which Stock Appreciation Rights may be exercised shall not exceed

16,000,000 shares of the Company's Common Stock The shares may be authorized and unissued shares or issued and reacquired shares, as the Board of Directors from time to time may determine. Shares with respect to which Options are not exercised prior to termination of the Option shall be available for Options thereafter granted under the Plan.

Section 4. **Participation.** The Committee may, from time to time, select and grant Options and Stock Appreciation Rights to such officers (whether or not directors) and other key employees of the Company and its subsidiaries ("optionee") and shall determine the number of shares subject to each Option.

Effective as to incentive stock options granted after December 31,1986, the aggregate fair market value of the Company's common stock, determined at the time of grant in accordance with the provisions of Section 5(b) with respect to which incentive stock options granted under this or any other Plan of the Company are exercisable for the first time by an optionee during any calendar year shall not exceed $100,000.

No incentive stock option shall be granted to any individual who at the time when the option would be otherwise granted is the owner directly or indirectly, of stock possessing more than ten percent (10%) of the total combined voting power of all classes of stock of the Company or any subsidiary thereof.

Section 5. **Terms and Conditions of Options.** The terms and conditions of each Option and each Stock Appreciation Right shall be set forth in an agreement or agreements between the Company and the optionee. Such terms and conditions shall include the following as well as

such other provisions, not inconsistent with the Plan, as may be deemed advisable by the Committee.

(a) Number of Shares. The number of shares subject to the Option.

(b) Option Price. The Option Price per share, which shall not be less than 100% of the fair market value of the Company's Common Stock on the date the Option is granted. Fair market value shall be deemed to be the mean between the highest and lowest sale prices of the Common Stock on the Consolidated Transaction Reporting System on the date the Option is granted.

(c) Date of Grant. Subject to previous directions of the Board of Directors pursuant to the last sentence of Section 2, the date of grant of an Option shall be the date when the Committee meets and awards such Option.

(d) Payment. The full purchase price of shares purchased by exercise of the Option shall be paid upon the exercise thereof. A holder of an Option shall have none of the rights of a stockholder until the shares are issued to him or her. Unless the terms of an Option provide to the contrary upon exercise, the Option Price shall be payable in cash or by delivering to the Company shares of the Company's Common Stock owned by the grantee having a fair market value (determined in accordance with Section 5(b)) at least equal to the Option Price or a combination of such Common Stock and cash equal to the Option Price or by delivering any other form of consideration which has been approved by the Committee; and payment of the Option Price by any such means shall be made prior to the delivery of the shares as to which the Option was exercised. Such right to deliver the Company's Common Stock in full or

partial payment of the Option Price shall be limited to twice per calendar year or such other frequency as the Committee shall determine in its absolute discretion.

(e) Terms of Options. Each Option granted pursuant to the Plan shall be for the term specified in the option agreement subject to earlier termination in all cases as provided in paragraph (g) of this Section.

(f) Exercise of Option. The Option may not be exercised during the first year after the date of grant nor after the Option is terminated as provided in paragraph (g) of this Section except (i) for persons retiring within one year after the date of grant in which case the date when the Option is exercisable shall be the same date as his or her retirement date or (ii) for an optionee who becomes disabled or who dies within one year after the date of grant in which case the date when the Option is exercisable shall be the same date as the date his or her disability commences or the date of his or her death provided the optionee has been in the continuous employment of the Company or one or more of its subsidiaries for at least two years at the time of his or her disability or death. One year after the date of grant of the Option, the optionee may exercise the Option at any time or in part from time to time provided the optionee has at the date of exercise been in the continuous employment of the Company and/or one or more of its subsidiaries for at least two years. Notwithstanding the foregoing, no Option may be exercised unless the optionee, except as provided in paragraph (g) of this Section, is then employed by the Company or any of its subsidiaries and shall have been continuously employed by the Company or one or more of such subsidiaries since the date of the grant of his or her Option. Non-qualified stock options and, subject to the

second paragraph of Section 4 hereof, incentive stock options may be exercised regardless of whether or not other Options granted to the optionee pursuant to the Plan are outstanding or whether or not other stock options granted to the optionee pursuant to any other plan are outstanding.

(g) Termination of Options. An Option, to the extent not validly exercised, shall terminate upon the occurrence of the first of the following events:

(i) On the date specified in the Option Agreement;

(ii) Three years after termination of the optionee's employment by the Company or its subsidiaries due to retirement or disability during which three year period the optionee may exercise the Option to the extent he or she was entitled to exercise it at the time of such termination;

(iii) Three years after the date of the optionee's death during which three year period the Option may be exercised by the optionee's legal representative or legatee or such other person designated by an appropriate court as the person entitled to exercise such Option, to the extent the optionee was entitled to exercise it at the time of his or her death;

(iv) Three months after termination by the Company or one of its subsidiaries of the optionee's employment for any reason other than retirement, disability or deliberate gross misconduct during which three month period the Option may be exercised by the optionee to the extent the optionee

was entitled to exercise it at the time of such termination;

(v) Concurrently with the time of termination by the Company or one of its subsidiaries of the optionee's employment for deliberate gross misconduct (for purposes only of this subparagraph (v) an Option shall be deemed to be exercised when the optionee has received the stock certificate representing the shares for which the Option was exercised); or

(vi) Concurrently with the time of termination by the employee of his or her employment with the Company or one of its subsidiaries for reasons other than retirement or disability.

(vii) No Options shall be exercisable after termination of employment unless the optionee shall have during the time period in which his or her Options are exercisable, (a) refrained from becoming or serving as an officer, director or employee of any individual, partnership or corporation or the owner of a business, or a member of a partnership which conducts a business in competition with the Company or renders a service (including without limitation, advertising agencies and business consultants) to competitors with any portion of the business of the Company, (b) made himself or herself available, if so requested by the Company at reasonable times and upon a reasonable basis to consult with, supply information to, and otherwise cooperate with, the Company and (c) refrained from engaging in deliberate action which, as determined by the

Committee, causes substantial harm to the interests of the Company. If these conditions are not fulfilled the optionee shall forfeit all rights to any unexercised Option or Stock Appreciation Right as of the date of the breach of the condition.

(h) Non-transferability of Options and Stock Appreciation Rights. Options and Stock Appreciation Rights shall not be transferable by the optionee other than by will or the laws of descent and distribution and Options and Stock Appreciation Rights shall during his or her lifetime be exercisable only by the optionee.

(i) Applicable Laws or Regulations. The Company's obligation to sell and deliver stock under the Option is subject to such compliance as the Company deems necessary or advisable with federal and state laws rules and regulations.

(j) No Right to Employment. Neither the existence of the Plan nor the grant of any Options or Stock Appreciation Rights pursuant to the Plan shall create in any optionee the right to continue to be employed by the Company or any of its subsidiaries. Employment shall be "at will" and shall be terminable "at will" by the Company or employee with or without cause. Any oral statements or promises to the contrary are not binding upon the Company or the employee.

Section 6. **Stock Appreciation Rights.**

(a) The Committee may, in its sole discretion, from time to time grant Stock Appreciation Rights to certain optionees in connection with any Option granted under this Plan. Stock Appreciation Rights may be

granted either at the time of the grant of an Option under the 1985 Stock Option Plan or at any time thereafter during the term of the Option. Stock Appreciation Rights may be granted with respect to all or part of the stock under a particular Option.

(b) Stock Appreciation Rights shall entitle the holder of the related Option, upon exercise, in whole or in part, of the Stock Appreciation Rights, to receive payment in the amount and form determined pursuant to subparagraph (iii) of paragraph (c) of this Section 6 Stock Appreciation Rights may be exercised only to the extent that the related Option has not been exercised. The exercise of Stock Appreciation Rights shall result in a pro rata surrender of the related Option to the extent that the Stock Appreciation Rights have been exercised.

(c) Stock Appreciation Rights shall be subject to such terms and conditions which are not inconsistent with the Plan as shall from time to time be approved by the Committee and to the following terms and conditions.

(i) Stock Appreciation Rights shall be exercisable at such time or times and to the extent, but only to the extent, that the Option to which they relate shall be exercisable.

(ii) Stock Appreciation Rights and any Options to which they relate shall in no event be exercisable during the first six months after the date of grant and such rights shall not be transferable other than by will or by the laws of descent and distribution and

shall be exercisable during the optionee's lifetime only by him or her or his or her guardian or legal representative.

(iii) Upon exercise of Stock Appreciation Rights, the holder thereof shall be entitled to elect to receive therefor payment in the form of shares of Common Stock (rounded down to the next whole number so no fractional shares are issued), cash or any combination thereof in an amount equal in value to the difference between the Option Price per share and the fair market value per share of Common Stock on the date of exercise multiplied by the number of shares in respect of which the Stock Appreciation Rights shall have been exercised, subject to any limitation on such amount which the Committee may in its discretion impose at the time of grant of the Stock Appreciation Rights. Such election as to the form of payment shall be subject to the consent of the Committee which consent or disapproval may be given at any time after the election to which it relates. The fair market value of Common Stock shall be deemed to be the mean between the highest and lowest sale prices of the Common Stock on the Consolidated Transaction Reporting System on the date the Stock Appreciation Right is exercised or if no transaction on the Consolidated Transaction Reporting System occurred on such date, then on the last

preceding day on which a transaction did take place.

(iv) Any exercise by an officer or director of Stock Appreciation Rights, as well as any election by such officer or director as to the form of payment to such officer or director (Common Stock, cash or any combination thereof), which election is subject to the consent of the Committee in its sole discretion as provided in subparagraph (iii) hereof, shall be made during the ten-day period beginning on the third business day following the release for publication of any quarterly or annual statement of sales and earnings by the Company and ending on the twelfth business day following the date of such release. For purposes hereof officer shall mean only officers who are subject to Section 16(b) of the Securities Exchange Act of 1934, as amended. In the event that a director or officer of the Company subject to Section 16(b) of the Securities Exchange Act of 1934 exercises a Stock Appreciation Right for cash or stock pursuant to this Section 6 during a "window period" as provided in Rule 16(b)-3 under the Securities Exchange Act of 1934, the day on which such right is effectively exercised shall be that day, if any, during such "window period" which is designated by the Committee in its discretion for all such exercises by such individuals during such period. If no such day is designated, the day of effective exercise shall

be determined in accordance with normal administrative practices of the Plan.

(d) To the extent that Stock Appreciation Rights shall be exercised, the Option in connection with which such Stock Appreciation Rights shall have been granted shall be deemed to have been exercised for the purpose of the maximum limitations set forth in the Plan under which such Option shall have been granted. Any shares of Common Stock which are not purchased due to the surrender in whole or in part of an Option pursuant to this Section 6 shall not be available for granting further Options under the Plan.

Section 7. **Adjustment in Event of Change in Stock.** In the event of stock split, stock dividend, combination of shares, merger, or other relevant change in the Company's capitalization, the Committee shall, subject to the approval of the Board of Directors, appropriately adjust the number and kind of shares covered by the Plan, the maximum number of shares that may be sold or for which Stock Appreciation Rights may be awarded under the Plan to any officer or employee, and the number, kind and Option Price of shares subject to outstanding Options; provided, however, that to the extent permitted in the case of incentive stock options by Sections 422A and 425 of the Internal Revenue Code, in the event that the outstanding shares of Common Stock of the Company are increased or decreased or changed into or exchanged for a different number or kind of shares or other securities of the Company or of another corporation, through reorganization, merger, consolidation, liquidation, recapitalization, reclassification, stock split-up, combination of shares or dividend payable in stock of the class which is subject to this Plan, appropriate

adjustment in the number and kind of shares as to which Options may be granted and as to which Options or portions thereof then unexercised shall be exercisable, and in the Option Price thereof, shall be made to the end that the proportionate number of shares or other securities as to which Options may be granted and the Option holders' proportionate interests under outstanding Options shall be maintained as before the occurrence of such event; and provided, further, that any such adjustment in shares subject to outstanding Options (including any adjustments in the Option Price) shall be made in such manner as not to constitute a modification as defined by subsection (h)(3) of Section 425 of the Internal Revenue Code.

Section 8. **Amendment and Discontinuance.** The Board of Directors of the Company may from time to time amend or revise the terms of the Plan, or may discontinue the Plan at any time as permitted by law, provided, however, that such amendment shall not (except as provided in Section 7), without further approval of the stockholders, (i) increase the aggregate number of shares which may be sold under the Plan; (ii) increase the maximum number of shares which may be sold under the Plan to any one individual; (iii) change the manner of determining the Option Price (other than determining the fair market value of the Common Stock to conform with applicable provisions of the Internal Revenue Code or regulations thereunder); or (iv) extend the term of the Plan or the maximum period during which any Option may be exercised. No amendments, revision or discontinuance of the Plan shall, without the consent of an optionee, in any manner adversely affect his or her rights under any Option theretofore granted under the Plan.

Section 9. **Effective Date and Duration.** The Plan was adopted by the Board of Directors of the Company on January 31, 1985, and approved by the stockholders of the Company. No Option may be granted under the Plan before January 31, 1985 nor after January 30, 1995. Options granted before January 31, 1995 may extend beyond the date last mentioned in accordance with their terms.

Section 10. **Construction.** The Plan and Options and Stock Appreciation Rights granted thereunder shall be governed by and construed in accordance with the Laws of the State of Delaware and in accordance with such Federal law as may be applicable.

American Home Products Corporation

1990 STOCK INCENTIVE PLAN

(As approved by stockholders on April 25, 1991 and as amended by the Board of Directors on January 30, 1992.)

Section 1. **Purpose.** The purpose of the 1990 Stock Incentive Plan (the "Plan") is to provide favorable opportunities for officers and other key employees of American Home Products Corporation (the "Company") and its subsidiaries to acquire shares of Common Stock of the Company or to benefit from the appreciation thereof. Such opportunities should provide an increased incentive for these employees to contribute to the future success and prosperity of the Company, thus enhancing the value of the stock for the benefit of the stockholders, and increase the ability of the Company to attract and retain individuals of exceptional skill upon whom, in large measure, its sustained progress, growth and profitability depend.

Pursuant to the Plan, options to purchase the Company's Common Stock and Stock Appreciation Rights may be granted and Restricted Stock may be awarded by the Company. Options to purchase the Company's Common Stock shall have a term not exceeding ten years from the date of grant for non-qualified stock options as shall be determined by the Committee (hereinafter defined), and for incentive stock options as hereinafter defined for such term as shall be determined by the Committee not exceeding ten years from the date of grant (the "Option" or "Options"). Options granted under the Plan may be either incentive stock options, as defined in Section 422(b) of the Internal Revenue

Code, or options which do not meet the requirements of said Section 422(b) of the Code, herein referred to as non-qualified stock options.

It is intended, except as otherwise provided herein, that incentive stock options may be granted under the Plan and that such incentive stock options shall conform to the requirements of Sections 422 and 424 of the Internal Revenue Code and to the provisions of this Plan and shall otherwise be as determined by the Committee and, to the extent provided in the last sentence of Section 2 hereof, approved by the Board of Directors. The terms "subsidiaries" and "subsidiary corporation" shall have the meanings given to them by Section 424 of the Internal Revenue Code. All section references to the Internal Revenue Code in this Plan are intended to include any amendments or substitutions therefor in such Code subsequent to the adoption of the Plan.

Section 2. **Administration.** The Plan shall be administered by a Compensation and Benefits Committee (the "Committee") consisting of three or more members of the Board of Directors of the Company who are not employees. The Committee shall have full authority to grant Options and Stock Appreciation Rights, and make Restricted Stock awards, to interpret the Plan and to make such rules and regulations and establish such procedures as it deems appropriate for the administration of the Plan, taking into consideration the recommendations of management. The decisions of the Committee shall be binding and conclusive for all purposes and upon all persons unless and except to the extent that the Board of Directors of the Company shall have previously directed that all or specified types of decisions of the Committee shall be subject to approval by the Board of Directors.

Section 3. **Number of Shares.** The total number of shares which may be sold or awarded under the Plan and for which Stock Appreciation Rights may be exercised shall not exceed 12,000,000 shares of the Company's Common Stock. The shares may be authorized and unissued or issued and reacquired shares, as the Board of Directors from time to time may determine. Shares with respect to which Options or Stock Appreciation Rights are not exercised prior to termination of the Option and shares that are part of a Restricted Stock award which are forfeited before the restrictions lapse shall be available for Options and Stock Appreciation Rights thereafter granted and for Restricted Stock thereafter awarded under the Plan. Further, any shares of the Company's Common Stock that are used in full or partial payment of the purchase price for any option under this Plan or any other stock option plan of the Company shall become available for issuance under the Plan.

Section 4. **Participation.** The Committee may, from time to time, select and grant Options and Stock Appreciation Rights to officers (whether or not directors) and other key employees of the Company and its subsidiaries ("optionee") and award Restricted Stock to officers (whether or not directors) and other key employees of the Company and its subsidiaries and shall determine the number of shares subject to each Option or award.

The aggregate fair market value of the Company's Common Stock, determined at the time of grant in accordance with the provisions of Section 5(b), with respect to which incentive stock options granted under this or any other Plan of the Company are exercisable for the first time by an optionee during any calendar year shall not exceed $100,000, or such other amount as may be permitted under the Internal Revenue Code.

No incentive stock option shall be granted to any individual who, at the time when the option would be otherwise granted, is the owner, directly or indirectly, of stock possessing more than ten percent (10%) of the total combined voting power of all classes of stock of the Company or any subsidiary thereof.

Section 5. **Terms and Conditions of Options.** The terms and conditions of each Option and each Stock Appreciation Right shall be set forth in an agreement or agreements between the Company and the optionee. Such terms and conditions shall include the following as well as such other provisions, not inconsistent with the Plan, as may be deemed advisable by the Committee:

(a) Number of Shares. The number of shares subject to the Option.

(b) Option Price. The Option Price per share, which shall not be less than 100% of the fair market value of the Company's Common Stock on the date the Option is granted. Fair market value shall be deemed to be the mean between the highest and lowest sale prices of the Common Stock on the Consolidated Transaction Reporting System on the date the Option is granted.

(c) Date of Grant. Subject to previous directions of the Board of Directors pursuant to the last sentence of Section 2, the date of grant of an Option shall be the date when the Committee meets and awards such Option.

(d) Payment. The full purchase price of shares purchased by exercise of the Option shall be paid upon the exercise thereof. A holder of an Option shall have none of the rights of a stockholder until the shares are issued to him

or her. Unless the terms of an Option provide to the contrary, upon exercise, the Option Price shall be payable in cash or by delivering to the Company shares of the Company's Common Stock owned by the grantee having a fair market value (determined in accordance with Section 5 (b)) at least equal to the Option Price, or a combination of such Common Stock and cash equal to the Option Price, or by delivering any other form of consideration which has been approved by the Committee; and payment of the Option Price by any such means shall be made prior to the delivery of the shares as to which the Option was exercised. Such right to deliver the Company's Common Stock in full or partial payment of the Option Price shall be limited to such frequency as the Committee shall determine in its absolute discretion.

(e) Terms of Options. Each Option granted pursuant to the Plan shall be for the term specified in the option agreement subject to earlier termination in all cases as provided in paragraph (g) of this Section.

(f) Exercise of Option. The Option may not be exercised during the first year after the date of grant nor after the Option is terminated as provided in paragraph (g) of this Section except (i) for persons retiring within one year after the date of grant in which case the date when the Option is exercisable shall be the same date as his or her retirement date or (ii) for an optionee who becomes disabled or who dies within one year after the date of grant in which case the date when the Option is exercisable shall be the same date as the date his or her disability commences or the date of his or her death provided the optionee has been in the continuous employment of the Company or one or more of its subsidiaries for at least two years at the time of his or her disability or death. One year after the date of grant of the

Option, the optionee may exercise the Option at any time or in part from time to time provided the optionee has, at the date of exercise, been in the continuous employment of the Company and/or one or more of its subsidiaries for at least two years. Notwithstanding the foregoing, no Option may be exercised unless the optionee, except as provided in paragraph (g) of this Section, is then employed by the Company or any of its subsidiaries and shall have been continuously employed by the Company or one or more of such subsidiaries since the date of the grant of his or her Option. Also, notwithstanding the provisions of this Section 5(f), Options which are granted by the Committee to replace shares of the Company's Common Stock used as part or all of the purchase price of other options shall, subject to the discretion of and determination by the Committee, be exercisable less than one year from the date of the Option grant. Non-qualified stock options and incentive stock options may be exercised regardless of whether or not other Options granted to the optionee pursuant to the Plan are outstanding or Whether or not other stock options granted to the optionee pursuant to any other plan are outstanding.

(g) Termination of Options. An Option, to the extent not validly exercised, shall terminate upon the occurrence of the first of the following events:

(i) On the date specified in the Option Agreement;

(ii) Three years after termination of the optionee's employment by the Company or its subsidiaries due to retirement or disability during which three year period the optionee may exercise the Option to the extent he or she was entitled to exercise it at the time of such termination;

(iii) Three years after the date of the optionee's death during which three year period the Option may be exercised by the optionee's legal representative or legatee or such other person designated by an appropriate court as the person entitled to exercise such Option to the extent the optionee was entitled to exercise it at the time of his or her death;

(iv) Three months after termination by the Company or one of its subsidiaries of the optionee's employment for any reason other than retirement, disability or deliberate gross misconduct during which three month period the Option may be exercised by the optionee to the extent the optionee was entitled to exercise it at the time of such termination;

(v) Concurrently with the time of termination by the Company or one of its subsidiaries of the optionee's employment for deliberate gross misconduct (for purposes only of this subparagraph (v) an Option shall be deemed to be exercised when the optionee has received the stock certificate representing the shares for which the Option was exercised); or

(vi) Concurrently with the time of termination by the employee of his or her employment with the Company or one of its subsidiaries for reasons other than retirement or disability.

(vii) No Options shall be exercisable after termination of employment unless the optionee shall

have during the time period in which his or her Options are exercisable, (a) refrained from becoming or serving as an officer, director or employee of any individual, partnership or corporation, or the owner of a business, or a member of a partnership which conducts a business in competition with the Company or renders a service (including without limitation, advertising agencies and business consultants) to competitors with any portion of the business of the Company, (b) made himself or herself available, if so requested by the Company, at reasonable times and upon a reasonable basis to consult with, supply information to, and otherwise cooperate with, the Company and (c) refrained from engaging in deliberate action which, as determined by the Committee causes substantial harm to the interests of the Company. If these conditions are not fulfilled, the optionee shall forfeit all rights to any unexercised Option or Stock Appreciation Right as of the date of the breach of the condition.

(h) Non-transferability of Options and Stock Appreciation Rights. Options and Stock Appreciation Rights shall not be transferable by the optionee other than by will or the laws of descent and distribution, and Options and Stock Appreciation Rights shall during his or her lifetime be exercisable only by the optionee.

(i) Applicable Laws or Regulations. The Company's obligation to sell and deliver stock under the Option is subject to such compliance as the Company deems necessary or advisable with federal and state laws rules and regulations.

Section 6. **Stock Appreciation Rights.**

(a) The Committee may, in its sole discretion, from time to time grant Stock Appreciation Rights to certain optionees in connection with any Option granted under this Plan. Stock Appreciation Rights may be granted either at the time of the grant of an Option under the Plan or at any time thereafter during the term of the Option. Stock Appreciation Rights may be granted with respect to all or part of the stock under a particular Option.

(b) Stock Appreciation Rights shall entitle the holder of the related Option upon exercise, in whole or in part, of the Stock Appreciation Rights, to receive payment in the amount and form determined pursuant to subparagraph (iii) of paragraph (c) of this Section 6. Stock Appreciation Rights may be exercised only to the extent that the related Option has not been exercised. The exercise of Stock Appreciation Rights shall result in a pro rata surrender of the related Option to the extent that the Stock Appreciation Rights have been exercised.

(c) Stock Appreciation Rights shall be subject to such terms and conditions which are not inconsistent with the Plan as shall from time to time be approved by the Committee and to the following terms and conditions.

(i) Stock Appreciation Rights shall be exercisable at such time or times and to the extent but only to the extent, that the Option to which they relate shall be exercisable.

(ii) Stock Appreciation Rights and any Options to which they relate shall in no event be exercisable during the first six months after the date

of grant and such rights shall not be transferable other than by will or by the laws of descent and distribution and shall be exercisable during the optionee's lifetime only by him or her or his or her guardian or legal representative.

(iii) Upon exercise of Stock Appreciation Rights, the holder thereof shall be entitled to elect to receive therefor payment in the form of shares of Common Stock (rounded down to the next whole number so no fractional shares are issued), cash or any combination thereof in an amount equal in value to the difference between the Option Price per share and the fair market value per share of Common Stock on the date of exercise multiplied by the number of shares in respect of which the Stock Appreciation Rights shall have been exercised, subject to any limitation on such amount which the Committee may in its discretion impose at the time of grant of the Stock Appreciation Rights. Such election as to the form of payment shall be subject to the consent of the Committee which consent or disapproval may be given at any time after the election to which it relates. The fair market value of Common Stock shall be deemed to be the mean between the highest and lowest sale prices of the Common Stock on the Consolidated Transaction Reporting System on the date the Stock Appreciation Right is exercised or if no transaction on the Consolidated Transaction Reporting System occurred on such date, then on the last preceding day on which a transaction did take place.

(iv) Any exercise by an officer or director of Stock Appreciation Rights as well as any election

by such officer or director as to the form of payment to such officer or director (Common Stock, cash or any combination thereof), which election is subject to the consent of the Committee in its sole discretion as provided in subparagraph (iii) hereof shall be made during the ten-day period beginning on the third business day following the release for publication of any quarterly or annual statement of sales and earnings by the Company and ending on the twelfth business day following the date of such release. For purposes hereof officer shall mean only officers who are subject to Section 16(b) of the Securities Exchange Act of 1934 as amended. In the event that a director or officer of the Company subject to Section 16(b) of the Securities Exchange Act of 1934 exercises a Stock Appreciation Right for cash or stock pursuant to this Section 6 during a "window period" as provided in Rule 16(b)-3 under the Securities Exchange Act of 1934, the day on which such right is effectively exercised shall be that day, if any, during such "window period" which is designated by the Committee in its discretion for all such exercises by such individuals during such period. If no such day is designated, the day of effective exercise shall be determined in accordance with normal administrative practices of the Plan.

(d) To the extent that Stock Appreciation Rights shall be exercised, the Option in connection with which such Stock Appreciation Rights shall have been granted shall be deemed to have been exercised for the purpose of the maximum limitations set forth in the Plan under which such Option shall have been granted. Any shares of Common Stock which are not purchased due to the surrender in whole or in part of an Option pursuant to this

Section 6 shall not be available for granting further Options under the Plan.

Section 7. **Restricted Stock Performance Awards.** The Committee may, in its sole discretion, from time to time, make awards of shares of the Company's Common Stock or awards of units representing shares of the Company's Common Stock, up to 2,000,000 shares, to such officers and other key employees of the Company and its subsidiaries in such quantity, and on such terms, conditions and restrictions (whether based on performance standards periods of service or otherwise) as the Committee shall establish ("Restricted Stock"). The terms, conditions and restrictions of any Restricted Stock award made under this Plan shall be set forth in an agreement or agreements between the Company and the recipient of the award.

(a) Issuance of Restricted Stock. The Committee shall determine the manner in which Restricted Stock shall be held during the period it is subject to restrictions.

(b) Stockholder Rights. Beginning on the date of grant of the Restricted Stock award and subject to the execution of the award agreement by the recipient of the award and subject to the terms, conditions and restrictions of the award agreement, the Committee shall determine to what extent the recipient of the award has the rights of a stockholder of the Company including, but not limited to, whether or not the employee receiving the award has the right to vote the shares or to receive dividends or dividend equivalents.

(c) Restriction on Transferability. None of the shares or units of a Restricted Stock award may be assigned or transferred, pledged or sold prior to their delivery to a

recipient or in the case of a recipient's death, to the recipient's legal representative or legatee or such other person designated by an appropriate court.

(d) Delivery of Shares. Upon the satisfaction of the terms, conditions and restrictions contained in the Restricted Stock award agreement or the release from the terms, conditions and restrictions of a Restricted Stock award agreement, as determined by the Committee, the Company shall deliver, as soon as practicable, to the recipient of the award, or in the case of his or her death to his or her legal representative or legatee or such other person designated by an appropriate court, a stock certificate for the appropriate number of shares of the Company's Common Stock, free of all such restrictions, except for any restrictions that may be imposed by law.

(e) Taxes. Notwithstanding any other provision hereof, the Committee may in its absolute discretion provide with respect to the delivery of shares to a recipient of a Restricted Stock award, that the number of such shares which the recipient thereof shall be entitled to receive and which shall be delivered by the Company shall be (i) the number of shares which would have been delivered in the absence of this Section 7(e), minus (ii) the number of whole shares of Common Stock necessary to satisfy federal, state and/or local tax withholding obligations which are imposed on the Company by applicable law in respect of the delivery of such award (and which may be satisfied by the reduction effected hereby in the number of deliverable shares), it being understood that the value of the shares referred to in clause (ii) above shall be determined, for the purposes of satisfying such withholding obligations, on the basis of the average of the high and low per share prices for the Common Stock as reported on the Consolidated Transaction Reporting System

on the date of authorization of delivery by the Committee, or on such other reasonable basis for determining fair market value as the Committee may from time to time adopt, Notwithstanding any term or provision of this Section 7(e), in determining the total number of shares which may be sold or awarded under this Plan pursuant to Section 3 hereof, the number of shares withheld in accordance with this Section 7(e) shall be available for issuance under the Plan.

(f) Forfeiture of Restricted Stock. Subject to Section 7(g), all of the restricted shares or units with respect to a Restricted Stock award shall be forfeited and all rights of the recipient with respect to such restricted shares or units shall terminate unless the recipient continues to be employed by the Company or its subsidiaries until the expiration of the forfeiture period and the satisfaction of any other conditions set forth in the award agreement

(g) Waiver of Forfeiture Period. Notwithstanding any other provisions of the Plan, the Committee may, in its sole discretion, waive the forfeiture period and any other conditions set forth in any award agreement under certain circumstances (including the death, disability or retirement of the recipient of the award or a material change in circumstances arising after the date of an award) and subject to such terms and conditions (including forfeiture of a proportionate number of the restricted shares) as the Committee shall deem appropriate.

Section 8. **Adjustment in Event of Change in Stock.** In the event of stock split, stock dividend, cash dividend (other than a regular cash dividend), combination of shares, merger, or other relevant change in the Company's capitalization, the Committee shall, subject to the approval of the Board of Directors, appropriately adjust the number

and kind of shares available for issuance under the Plan, the number, kind and Option Price of shares subject to outstanding Options and Stock Appreciation Rights and the number and kind of shares subject to an outstanding Restricted Stock award; provided, however, that to the extent permitted in the case of incentive stock options by Sections 422 and 424 of the Internal Revenue Code, in the event that the outstanding shares of Common Stock of the Company are increased or decreased or changed into or exchanged for a different number or kind of shares or other securities of the Company or of another corporation through reorganization, merger, consolidation, liquidation, recapitalization, reclassification, stock split-up, combination of shares or dividend, appropriate adjustment in the number and kind of shares as to which Options may be granted and as to which Options or portions thereof then unexercised shall be exercisable, and in the Option Price thereof, shall be made to the end that the proportionate number of shares or other securities as to which Options may be granted and the Option holders' proportionate interests under outstanding Options shall be maintained as before the occurrence of such event; provided, that any such adjustment in shares subject to outstanding Options (including any adjustments in the Option Price) shall be made in such manner as not to constitute a modification as defined by subsection (h)(3) of Section 424 of the Internal Revenue Code; and provided, further, that in the event of an adjustment in the number of shares or kind under a Restricted Stock Performance Award pursuant to this Section 8 any new shares or units issued to a recipient of a Restricted Stock Performance Award shall be subject to the same terms conditions and restrictions as the underlying Restricted Stock Performance Award for which the adjustment was made.

Section 9. **Amendment and Discontinuance.** The Board of Directors of the Company may from time to time amend or revise the terms of the Plan or may discontinue the Plan at any time as permitted by law, provided, however, that such amendment shall not (except as provided in Section 8) without further approval of the stockholders, (i) increase the aggregate number of shares which may be sold or awarded under the Plan; (ii) change the manner of determining the Option Price (other than determining the fair market value of the Common Stock to conform with applicable provisions of the Internal Revenue Code or regulations thereunder); or (iii) extend the term of the Plan or the maximum period during which any Option may be exercised. No amendments, revision or discontinuance of the Plan shall, without the consent of an optionee, in any manner adversely affect his or her rights under any Option theretofore granted under the Plan.

Section 10. **Effective Date and Duration.** The Plan was adopted by the Board of Directors of the Company on November 29, 1990 and restated on January 31, 1991, subject to approval by the stockholders of the Company at a meeting to be held on April 25, 1991. Neither the Plan nor any option or Stock Appreciation Right or Restricted Stock award shall become binding until the Plan is approved by a vote of the majority of the Company's outstanding stock. Notwithstanding the foregoing, the provisions set forth in the last sentence of Section 3 and the last sentence of Section 7(e) shall not be effective (i) at any time prior to the effectiveness with respect to the Plan of the revised rules for employee benefit plans under Section 16 of the Securities Exchange Act of 1934 issued by the Securities and Exchange Commission on February 8, 1991, either upon election by the Company or otherwise, unless and until the Committee has received an opinion of counsel to the Company satisfactory

to the Committee to the effect that such provisions are not inconsistent with the requirements of Rule 16b-3 under the Securities Exchange Act of 1934 as such rule is in effect prior to May 1, 1991, and (ii) at any time after such effectiveness unless and until the Committee has received such an opinion to the effect that such provisions are not inconsistent with the requirements of Rule 16b-3 as then in effect. No option may be granted and no stock may be awarded under the Plan before November 29, 1990 nor after November 28, 2000. Options granted and stock awarded before November 29, 2000 may extend beyond the date last mentioned in accordance with their terms.

Section 11. **Construction and Conditions.** The Plan and Options, Restricted Stock Awards, and Stock Appreciation Rights granted thereunder shall be governed by and construed in accordance with the laws of the State of Delaware and in accordance with such Federal law as may be applicable.

Neither the existence of the Plan nor the grant of any Options or Stock Appreciation Rights or awards of Restricted Stock pursuant to the Plan shall create in any optionee the right to continue to be employed by the Company or its subsidiaries. Employment shall be "at will" and shall be terminable "at will" by the Company or employee with or without cause. Any oral statements or promises to the contrary are not binding upon the Company or the employee.